CHAPTER XVI.

THE SHIAH LAW RELATING TO WAKF.

SECTION I.

GENERAL OBSERVATIONS.

How *wakf* may be constituted under the Shiah Law.

Wakf, according to the Shiah doctrines, is a religious act, the effect of which is to tie up the *corpus* or substance of a thing, and to leave its usufruct free. According to the *Jawâhir ul-Kalâm*, the object of a *wakf* is the continuance in perpetuity of a benefaction in the service of the Deity, and it is an act of *'ibâdat* (worship). The express word by which it may be created is *wakafto*, *i.e.*,—"I have dedicated;" but, as already pointed out before in relation to the Hanafî Law, a *wakf* may be created by any other expression when the intention is apparent. The *Jawâhir ul-Kalâm* states that there is nothing in law to debar the creation of a *wakf* by the use of any other expression besides *wakafto*. For example, a *wakf* may be created by the expression *haramto* ("I have consecrated"), or *tassadukto* ("I have given in charity.") But as absolute perpetuity is not a necessary incident of these expressions, reference must be made to the intention of the donor. The meaning of this is, when the intention of the grantor is clearly to create a *wakf*, whatever expression he may have used, the dedication will take effect, but where the term *wakf* itself is used, the dedication will take effect as such without any question. If a person make use of an expression which does not, in any degree, convey the idea of *wakf* and yet acknowledge that he intends to make a *wakf* thereby, it will take effect as a *wakf*. If a man were to say, "I have consecrated this house for the poor and given it in perpetuity," it would be a *wakf*. If he were to say, "I have tied up this property and given it in the way of God," or "that I have tied up this property and given the profits in the way of God," it would be a *wakf*.

Phudia Bibi and others v. *Haji Mohammed Kazem Isphahani and others* (unreported).

Where a trust is expressly created, the introduction of words of gift does not change the character of the *wakf*. This question was considered at some length in the case of *Phudia Bibi and others* v. *Haji Mohammed Kazem Isphahani and others*, decided by Pigot, J., on the 31st of March 1884, upon the construction of the will of Nawab Sidi Nazir Ally Khan. By his will the Nawab had devised all his property to an executor, whose heirs the plaintiffs claimed to be, on certain trusts which were purely discretionary. The plaintiffs contended that the devise was an absolute gift to the executor, Meer Mohammed Kazem. The defendants contended that though the term *wakf* was not used in the document, which was in the English language and form, it was a valid *wakf*. The will was as follows :—

"This is the Last Will and Testament of me Nawab Sidi Nazir Ally Khan of Ballygunge in the suburbs of the town of Calcutta, zemindar, whereas I am indebted to various persons in large sums of money such loans being secured to them by mortgages over my real Estate in Calcutta and in the Mofussil, and my Promissory Notes, and whereas being about to leave India I am desirous of making a Testamentary dispositiou of my property in the event of my decease, I give devise and bequeath all my real and personal Estate whatsoever and wheresoever of which I shall be seized and possessed at the time of my death unto Meer Mohammed Kazem Jowahery of Chitpore Road in Calcutta, upon Trust at his discretion and at his absolute authority and as and when he or any other of the Trustee or Trustees for the time being of this my Will shall think fit to sell and dispose of, collect and get in and convert in money all and singular my said real and personal Estate or any or such portion thereof as he the said M. M. Kazem or any other Trustee or Trustees for the time being of this my Will shall, in his or their discretion think fit or advisable and upon further Trust by with and out of the monies to arise from such sales and collection to pay satisfy and discharge all my just debts and Funeral and Testamentary expenses and upon further Trust to lay out and expend such portion of the surplus of the said monies as the said Trustee for the time being of this my will shall think fit in the construction or building of a Mosque, Imambara or Mahommedan religious Institution to be called by my name for the performance and observance of religious ceremonies and festivals and acts of piety and charity inculcated in and enjoined by the Mahommedan religion the nature character and extent of which shall be in the entire and absolute discretion of the Trustee of this my Will for the time being and upon further Trust to lay out and invest the residue of the said monies after payment of the cost of the construction of the said Mosque, Imambara or other Mahommedan religious Institution as aforesaid in or upon Securities of the Government of India or in or upon the purchase or real property in Bengal and I direct that the said Trustee or other the Trustee or Trustees for the time being of this my Will shall hold the interests, rents and profits of the said Securities or real property in which the said monies may from time to time be invested upon trust to apply the same in and towards the repairs, maintenance and preservation of such parts of the said real Estate as shall not have been sold as well as of the real Estate in which the said Trust monies may be invested and the payment of all Rents, Revenues, Taxes and other outgoings and

expenses incidental thereto and upon Trust to apply the surplus or balance of such interest rents and profits and also the rents and income arising from such parts of my said Estate as may not be sold as follows, that is to say as to such portion thereof as the said Trustee or other the Trustees for the time being of this my Will shall, in his or their judgment and discretion think fit in and towards the performance and observance of religious ceremonies and festivals and acts of piety and charity inculcated in and enjoined by the Mahommedan religion the nature character and extent of which shall be entirely in the judgment and discretion of my said Trustee or other the Trustee or Trustees for the time being of this my Will and as to the balance or residue thereof to and for the absolute use and benefit of the said Trustee or other the Trustee or Trustees for the time being of this my Will and I give and bequeath the same unto him or them his or their executors administrators or assigns accordingly.

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Provided also and I further declare that it shall be lawful for the said Trustee or Trustees for the time being of this my Will at any time or from time to time in the discretion of the said Trustee or Trustees to sell or dispose of any stocks, funds, securities or lands wherein any of the Trust monies for the time being shall or may happen to be invested and to invest the money to arise from such sale in any other stocks or funds or other Government Securities or in purchase of real Estates in Bengal and convey or transfer the same as occasion shall require or shall be thought fit. Provided also and I hereby declare that in case the said Meer Mohammed Kazem shall die in my lifetime or shall renounce the execution of the Trusts hereby created or in case the said Meer Mohammed Kazem or any Trustee or Trustees to be appointed under this present provision shall die or shall be absent from Bengal for the space of six consecutive calendar months at one time or shall otherwise become unwilling or unable to act in the aforesaid Trusts then and so often as the same shall happen it shall be lawful for the said Meer Mohammed Kazem or other the Trustee for the time being or if there be no Trustee then for the Executors or administrators of the last deceased Trustee to nominate any fit person or persons to supply the place of the Trustee so dying residing abroad or becoming unwilling or unable to act as aforesaid and that immediately after every such appointment the said Trust Estates monies and effects stocks, funds or securities shall be conveyed or transferred in such manner that the same may vest in such new Trustee and such new Trustee shall have and be capable of exercising all the powers and authorities whatever hereinbefore containing in the same manner to all intents and purposes as if he or they had been appointed a Trustee or Trustees by this my Will.

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The learned Judge with reference to the principal contention, held as follows :—

"Now it is contended that by this document Nazir Ally gave his estate to Meer Mohammed Kazem subject to trusts merely colorable and not intended to be carried out. The question is, whether this contention is a valid one. The principal case relied on by Mr. Phillips was *Morrice* v. *The Bishop of Durham.*(1) Now, in

(1) 10 Ves., p. 510.

this case it appears to me the question is not whether a good trust was created, but the plaintiff's case will not succeed, unless it is shown by her that Meer Mohammed Kazem was not intended to take as a trustee. If he was intended to take as a trustee, he would not take any beneficial interest. The deed declares that Meer Mohammed Kazem takes as a trustee. It lies upon the plaintiff to show that he was to take absolutely. There can be no doubt that there was a trust regarding some portion, in the building of the mosque, &c. So far, therefore, he took as a trustee. But as regards the unconsumed income, it has been contended that Meer Mohammed Kazem took absolutely. The Will, however, says that he was to take it as a trustee. If it had said that the office of *mutwalli* was hereditary, a step might be gained in favour of the plaintiff's contention. But it is not so here. It cannot be said that the beneficial interest was given to the heirs of Meer Mohammed Kazem when each trustee has the power of appointing another person as trustee. Then I am to regard the various clauses in the Will regarding the appointment and responsibilities of the trustees. I might, perhaps, if I were not deciding the question judicially, have said that Nazir Ally probably intended that the property should, or expected that it would, descend to his friend's descendants, each of them successively exercising his power of appointment in favour of his heir, or some of his heirs. But I cannot import this conjecture into my judgment for the purpose of construing the plain terms of the Will. Then it was argued that the mere beneficial enjoyment of the unexpended income indicates a strong intention to create a beneficial interest and did in fact create such an interest. Without examining the cases in detail, it is sufficient to say that the cases cited by Mr. Kennedy and Mr. Ameer Ali, notably those of *Doe dem Jaun Beebee* v. *Abdollah Barber* and *Advocate-General* v. *Fatima Bibi*, show that no surmise can be founded upon the fact that the residue or balance of the income was to be enjoyed by the Trustee. That being so, I think the contention of the plaintiff must fail, and the issue raised whether the estate of Nazir Ally formed part of the estate of Meer Mohammed Kazem must be determined in the negative."

The *Sharâya* defines a *wakf* in the following terms :—

"*Wakf* is an act (*'akd*)(1) the (fruit) effect of which is to tie up the original of a thing, and to leave its usufruct free. The only express word by which it can be constituted is '*wakafto*,' 'I have appropriated'; for with regard to '*haramto*,' 'I have consecrated,' and '*sadakto*,' 'I have given in charity' they are not sufficient to constitute *wakf* without accompanying circumstances, as by themselves they are susceptible of another interpretation besides *wakf*. If, however, they are used with the intention of constituting *wakf*, they are obligatory on the conscience of the person employing them without any circumstances to fix their meaning. And if he should actually acknowledge that he used them with that intention judgment should be given against him in terms of his acknowledgment. It has been said, indeed, that if he should say, '*Habasto-wa-Sabalto*,' *wakf* would be constituted even without any circumstances to point this meaning, because, he, on whom be peace, [*viz.*, the Prophet] has said, '*Habis ul asl wa subîl ul sumrat*' (tie up the substance and give away the fruit). Others, however, have maintained that there would be no *wakf* in these cases without corroborative circumstances, as the words by themselves would not commonly be so understood; and this is the more approved opinion."

Definition of the term *wakf*.

The opinion expressed in the *Sharâya* is explained in the *Jawâhir* by the light of the dictum contained in the *Ghunia* and other works of authority. In other words, when a disposition is made by terms which are equivocal in their meaning, reference is to be made to the intention of the donor. If he is alive, he will

(1) The Arabic expression' *akd* is ordinarily translated as meaning a "contract," an act in which two persons are concerned and the obligation arising therefrom depends on the mutual consent of the parties. This is the sense in which Mr. Justice Mahmood, in his elaborate judgment in *Agha Ali Khan* v. *Altaf Hassan Khan* (I. L., 14 All., 429), construed the word, although the *Jâm'aa-ush-Shittât* distinctly states that "the meaning of' *akd* in this connection (*i.e.*, with the subject of *wakf*) is general and includes (unilateral) declarations." * ایقاع است مراد از عقد درین جا عام از. The learned judge has placed a rather narrow construction on the Shiah Law in the case referred to. This case has been recently overruled by the Privy Council, in the case of *Baker Ali Khan* v. *Anjuman Ara Begum and others*, supra (1902), L. R., 30 I. A., 94, s. c., 7 C. W. N., p. 465. In this case their Lordships of the Judicial Committee lay down the following important principle of interpretation. "It would be extremely dangerous to accept as a general principle that new rules of law are to be introduced because they seem to lawyers of the present day to follow logically from ancient texts, however authoritative when the ancient Doctors themselves have not drawn those conclusions."

explain his meaning; if he is dead, his intention is to be gathered from the nature of the object in favour of which the grant is made or other attendant circumstances. For example, under the Shiah Law, a *hubs* or the creation of a limited estate is lawful; therefore, if a grant is made in favour of an *individual*, by that term, it may either mean a life-grant or a *wakf*. Therefore, reference must be made to the intention of the grantor. If he said '*hubs*' in favour of *A*, and then for the poor, it will be a *wakf*, or if it was a *hubs* in favour of a mosque or any object of public utility (*maslahat*), it will be a *wakf*. A *wakf* may be created for a mosque or any other object of utility (*maslahat*) by any expression; for the nature of the object being permanent and religious, carries with it the meaning of consecration.(1)

As in the case of other obligations, intention is an essential element in the constitution of a *wakf*, and "a dedication by one who is unconscious, غافل, or asleep or drunk is not valid." When the *wakf* is in favour of a specified individual or individuals, who are *sui juris* and are competent to signify their acceptance and in a position to do so, some jurists have held that the beneficiaries should expressly or impliedly accept the benefaction. But by general *consensus* acceptance is not required when the *wakf* is in favour of a minor (*saghîr*), or persons labouring under a disability, or yet unborn or for large bodies of people or for a purpose in which the generality of people are interested (*jihat-ul-'aâmma*).(2) Even in the case of a *wakf* for specific individuals who are *sui juris*, acceptance is not requisite when the *wâkif* himself alters the character of the possession.

Shiah Law: Possession necessary; subject to qualifications.

"And the delivery of possession (*ikbûz*) is a necessary condition for the validity of the *wakf*." But this principle also should

(1) In his judgment in the case of *Agha Ali Khan*, Mr. Justice Mahmood has quoted the following passage from the *Jâm'aa-ush-Shittât*—صنعقده نمي شود بلى ، زينهٔ شرط است و بدون آن which he has translated thus:—"yes, the use of formal technical expression is an essential condition and without it *wakf* is not established." (The word "essential" does not appear in the original.) *Sigha* here means merely the formula of *wakf*. The learned Judge omitted to observe that the *approved* doctrine is that the use of the set formula *wakafto*, is necessary only when the dedication is made in favour of an object or objects which are not in their nature permanent or pious or religious. The words necessary to constitute a valid *wakf* under the Shiah Law were considered by the Allahabad High Court in the case of *Salig-un-Nissa* v. *Moti Ahmed* [1903], I. L., 25 All., 418.

(2) This is by no means exhaustive. Mr. Justice Mahmood's rendering of *Jihat-ul-'aâmma* by "public" charities is, with all respect, erroneous.

be taken subject to the conditions pointed out in dealing with the Hanafî Law, that is, actual change of possession is not necessary, constructive transfer being sufficient. For example, it is lawful for the *wâkif* to constitute himself *mutwalli*. In such a case, a formal change of possession is out of the question. *And, therefore, what is intended by the principle is not actual delivery of possession to another, but change in the character of the possession or of the dominion exercised over it.* It is in this sense that the *Mafâtîh* declares that, if the *wâkif* continue to exercise his right over the *wakf* property and make no change in the character of his possession, the *wakf* will not take effect. Where a dedication is for a public purpose, no (express) delivery of possession is necessary, for the user of it by any individual is sufficient to validate the *wakf*.(1)

According to the *Jawâhir*, delivery of possession is not necessary also where the *wakf* is in fact a *sadakah* or a charitable grant. Similarly, in the case of a *masjid* or any *maslahat* or object of general utility, *jihat-ul-'aâmma*. In these cases the mere non-delivery of possession will not avoid the *wakf*. When the *wakf* is in favour of private individuals who are *sui juris*, a trustee should either be appointed and possession delivered to him to hold in trust for the beneficiaries, or if the *wâkif* continues to hold the *wakf*, his possession must be expressly that of a trustee.

When a *wakf* is created for the *wâkif's* minor children, transmutation of possession is not needed. The law presumes the father's possession to be that of a *mutwalli* on behalf of the minors.(2) Similarly in the case of a *wakf* for the poor.(3)

I have dealt with the subject of *ikbâz* in a previous chapter.(4) It is only necessary to explain that under the condition of *ikbâz*, **Ikbâz or delivery of possession.**

(1) *Jawâhir-ul-Kalâm*, chapter on *Wakf*.

(2) *Ibid.*

(3) *Ibid*; *Ghunia*. The *Sharâya* no doubt says that "if a man were to make a *wakf* and die without giving possession the *wakf* would be void, but if a *wakf* be made in death-bed and *possession be given*, then it will take effect to the extent of a third if the heirs do not consent. Without possession the *wakf* fails whether made in health or illness." And again "it (the *wakf*) does not become binding except by delivery of possession, and when completed (by delivery of possession) it cannot be revoked if made in health, but if made during illness and allowed by heirs (it is operative in full), otherwise it is valid as regards a third." This, in my opinion, does not mean actual delivery of possession, but such a manifestation of intention to transfer the property as is compatible with the physical condition of the person creating the *wakf*.

(4) See *ante*, pp. 112-122.

actual delivery of possession is not requisite. What is required is an indication that the *wâkif* has divested himself of his proprietary interest in the subject of the *wakf*. If the property is immovable, delivery of the title-deeds would satisfy the requirements of the law. If it is a house, the delivery of the key, or if they are Government securities in deposit with any Bank, the delivery of the deposit receipt, or if it is a business, a transfer-entry in the books, as in the case of a gift, would be a sufficient transmutation of possession.

Transmutation of possession.

When all the conditions requisite for the completion of a *wakf* are complied with, it becomes absolute (if made in health) and cannot be revoked. "On this point," says the author of the *Jawâhir ul-Kalâm*, "Abû Hanîfa differs from us, though his disciple Abû Yusuf on arriving at Bagdad dissented therefrom. If the subject of the *wakf* has once changed possession and ceased to be under the *wâkif's* dominion, or has come into the hands or under the control of the beneficiaries or the trustee on their behalf, the *wâkif* cannot revoke it or change the conditions of the *wakf* or withdraw it from the way of God or from the purposes to which it is dedicated."

"If the *wakf* is for minor children, it is irrevocable, though no change of possession has taken place."

All this relates to a *wakf inter vivos*. A testamentary *wakf* (a *wakf bi'l wasiat*) which is to take effect after the decease of the testator, is a revocable disposition.

In the case of *Agha Ali Khan*,(1) it was held by Mr. Justice Mahmood that such a *wakf* was not valid and operative even as regards the disposible one-third, unless possession has been transferred during the lifetime of the *wâkif*.

Effect of a testamentary *wakf*.

His opinion amounts to this that a testamentary *wakf* would be inoperative *in toto*, unless effect was given to it in fact by delivery of possession during the lifetime of the testator, and that the consent of the heirs would not validate it. It is submitted, however, that this view proceeds upon a strained construction of the law and has since been disaffirmed by their Lordships of the Privy Council in the case of *Baker Ali Khan* v. *Anjuman Ara Begum*,(2) where it has been held that a valid *wakf* can be created

(1) Supra, p. 497.

(2) [1902], 7 Cal. W. N., 465, s. c., I. L., 25 All., 236.

under the Shiah Law by will. And in *Muhammad Ahsan* v. *Umardaraz*,(1) the Allahabad High Court has held that a *wakf* created by a Shiah by his will was not invalid on the ground that it was not absolute and unconditional, merely because it contained clauses cancelling the will if any child should be born to the testator in his lifetime and reserving to the testator power to cancel or modify any of the conditions of the will. In this case the testator had directed that the *income* of the property should be devoted to the purposes of the *wakf* only after the death of his widow to whom he gave the life-interest. The High Court held that where it was clear from the other terms of the will that the *corpus* was to be devoted to the purposes of the *wakf*, the mere fact that the property did not at once on the testator's death pass to the trustees of the endowment and their enjoyment wes postponed to the life-interest of the widow for maintenance, did not invalidate the *wakf*.

Wakf made in death-illness valid as to whole if consented to by the heirs.

If a *wakf* be constituted at a time when the *wâkif* is suffering from a *death-illness*, and there is a clear indication of an intention on his part to transfer possession, it will take effect with reference to the entirety of the dedication, provided the heirs consent, *either before or after the death of the wâkif*, otherwise the *wakf* will operate only in respect of one-third of the estate of the testator. "For a *wakf* is like other acts which take effect immediately such as *hiba*, sale and similar obligations." If the *wakf* property is covered by one-third of the estate, then it is valid as regards the entirety of the dedication. If not, each provision will be given effect to with regard to its priority until one-third of the estate is exhausted.

"If a person," says the *Sharâya*, "should, in death-illness make a *wakf*, gift or *muhâbât* (2) sale, or emancipate a slave, and the acts be not allowed by his heirs, then they would be valid if they can be carried into effect out of a third of his estate; otherwise they are to be preferred according to priority of date, and effect is to be given to each in order until the third of the estate is exhausted, after which any that may remain is void."(3)

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(1) [1906], I. L., 28 All., 633.

(2) For the meaning of the word *Mubâhât*, see Index of technical terms.

(3) *Sharâya-ul-Islâm*, p. 234.

Agha Ali Khan v. *Altaf Hossain Khan.*

In the case of *Agha Ali Khan*, the learned Judge was of opinion that in the case of a death-bed *wakf*, delivery of possession was equally necessary as in *wakfs* made in health (وقف الصحت). The view is founded upon purely inferential reasoning, for the text cited certainly does not support it. "If a person made a gift or *wakf* or charitable donation in his death-sickness, it is to be satisfied out of one-third, according to the better of the two opinions, excepting in the case of the heirs giving sanction. The same rule applies if he did so in good health and delayed possession till sickness."(1)

This does not show that the latter qualification is applicable to the first part, it only indicates that the effect in both cases is identical. The greatest of Shiah lawyers (Shaikh J'aafar) whilst pointing out the differences between the Sunnis and Shiahs regarding *wakfs* constituted in the last illness does not make a single reference to the delivery of possession being a necessary condition.(2) What is required is a clear indication of the intention of the *wâkif* to create the *wakf* and to transfer possession.

Wasiat bi'l wakf.

A direction to the heirs or to executors to make a *wakf* of a certain property upon the death of the te tator is called a *wasiat bi'l wakf*. There is this difference between immediate dispositions of property, *i.e.*, dispositions *inter vivos* and bequests, that in the former case the one-third takes effect in respect of the existing property, whereas in the case of a bequest, consideration has to be paid to the condition of the estate after the decease of the testator. If there happen to be many bequests in a *wakf*, and it is difficult to determine which provision should take priority, *i.e.*, when all the provisions are of the same degree of importance, in that case, according to the Shaikh(3) all the provisions should be given effect to, and the one-third respecting which the *wakf* is operative should be applied to the effectuation of all the objects. "When a person," says the *Sharâya*, "has bequeathed pro-

(1) *Sharh Lum'aa* of Shahîd Sâni, p. 108.

(2) In the *Mabsût*. The *Sharâya* says "if one should make an appropriation and die without giving possession it would be part of his inheritance." This again does not mean that there should be delivery of possession, in the literal sense; what is required is a change in the character of the possession, indicative of the fact that the *wâkif* has parted with the proprietary right in the property.

(3) *Mafâtîh* after the *Mabsût*; Shaikh Murtaza is meant here. See Introd.

perty for the performance of certain duties, some of which were incumbent on the testator and others only optional, they are all to be carried into effect if a third of his estate be sufficient for the purpose. If the third should not suffice and the heirs refuse their consent, those duties that were incumbent on the testator must first be discharged out of the general mass of his estate, and then the others out of a third of what remains beginning with that first mentioned by the testator, and so on in order. If none of the duties are of the incumbent description, but all optional, they take effect only to the extent of a third of the estate and are to be discharged beginning with that first mentioned by the testator, and so on in order until the third is exhausted."

SECTION II.

CONDITIONS RELATING TO THE SUBJECT OF WAKF.

Under the Shiah Law it is requisite: (i) that the subject of the *wakf* should be *m'aalûm* (specified or ascertained and not indeterminate), (ii) that it should be of such a nature that the benefit accruing therefrom should be permanent, or as the *Sharâya* says "capable of yielding benefit without itself being consumed," and (iii) that it can be transferred from one *mutwalli* to another." This is expressly enunciated in the *Jawâhir ul-Kalâm*. It is also requisite, (iv) that it be the property of the appropriator.

The ancient views.

According to the ancients, the *wakf* of anything which did not exist in specie was not valid, *e.g.*, the *wakf* of a debt payable to a person was not regarded as valid,(1) because it was a thing, in their opinion, not existing in specie.

The subject of *wakf*.

They also held that where a thing could not yield a profit without being consumed in the process, the *wakf* thereof was invalid. Profit *quâ* profit was, upon the same reasoning, considered incapable of being consecrated. But, as will be seen later, the reasons upon which the ancient opinions were founded, have been considerably modified owing to altered circumstances and the development of industry and commerce.

The observant reader will not fail to notice the close analogy existing between the Hanafî and the Shiah Law on

(1) *Sharâya-ul-Islâm*, p. 248. This must, however, be taken subject to qualifications discussed afterwards.

the subject under discussion. The early Hanafî lawyers regarded the *wakf* of movables (excepting a few recognised by tradition) as invalid, because there was no permanency in them, and because they would be consumed in their use. The Shiah lawyers, however, were in advance of the Hanafî jurists in one respect. They held that the *wakf* of anything from the use of which benefit could lawfully be derived, consistently with the preservation of the thing itself, was valid; thus the *wakf* of a trained dog or cat was held to be valid, "from the possibility of benefit being derived from them."(1) They also held on the same principle,(2) the *wakf* not merely of land and houses, but of clothes, ornaments, furniture and lawful instruments to be valid. The *Jawâhir* goes further and adds, "though the *wakf* of food and such like things is not valid, because they are consumed in their use, the *wakf* of violets, or flowers in general, and lamps (*kandîl*), mats, &c., is valid according to custom and times."

Wakf of debts.

As regards the legality of the *wakf* of debts they argued thus: "The *wakf* of a *dayn* which is a thing indeterminate, is not valid by reason of there being no certainty or identity of the same."(3) With reference to the *wakf* of money, they supposed that the element of permanency was wanting. The *Jawâhir-ul-Kalâm* has discussed the subject at some length. "And whether the *wakf* of *dinârs* and *dirhems* is valid or not, the opinion of some is that it is not, and this seems to be in accord with the ancients (*mutakaddamîn*). And in the *Mabsût* it is said that there is general agreement about it, with the exception of those who hold it valid, who are few. The reason is that *dinârs* and *dirhems* are expended and no further use can be derived from them, and this is against the principle that a *wakf* must always be subsisting and its profit should be applied for the relief of the poor and in other good acts; but when the profit of a thing is always subsisting, as in the case of a honeycomb, it is valid." A close examination of the authorities leads to the result that the *wakf* of profits and of moneys, when they can be permanently applied in trade or commerce, so

Modern doctrine.

(1) *Sharâya.* This shows how elastic the rule is, and that one must not go by the letter of the law but by its spirit.

(2) *Ibid.*

(3) *Mafâtîh.*

that permanent benefit may be derived from the same, is valid, as will be seen from the remarks which have already been made in respect of the Hanafî Law. This view is in accord with the altered conditions of society. The principle, upon which the more ancient lawyers of the Shiah school have proceeded, in holding that the *wakf* of money and *munâf'aa* (profit) is invalid, is that such subjects either possess no stability or permanence, or that they are expended in their application for the purposes for which they are dedicated. But when money is applied in trade, or where profit is derived from investments, the objection which seemed to them to possess so much force, loses all weight, and it is on this ground that modern Shiah lawyers have upheld the validity of such *wakfs*.(1) Similarly the *wakf* of a debt which is determinate and capable of specification has been recognised to be valid.

The subject of a *wakf* must also be particularly specified, so that, if a person were to say "I have appropriated a house or mansion," it would not be valid unless he specifies which house he means. But if the subject of the *wakf* is not distinctly specified, but is capable of being ascertained by enquiry, such *wakf* would be valid.

The subject of a *wakf* must be specified or be capable of identification.

It is a condition that the property dedicated should belong to the *wâkif*; otherwise the *wakf* is not valid. If the dedication, however, is made of a property belonging to another, the *wakf* would be validated by the ratification of the real owner.

The *wakf* of a *mushâ'a* or an undivided share in a thing is valid, and possession of it is to be taken in the same way as in the case of a sale.(2)

Wakf of *mushâ'a* valid.

Section III.

Conditions relating to the Wakif.

It is a condition that the *wâkif* should be *bâligh* (adult); that he should be possessed of complete understanding, and of the capacity to deal with his property, that is, be subject to no "inhibition" on the ground of incapacity. The author of the *Jawâhir* is inclined to think, and rightly, that the latter condition

Conditions relating to the *wâkif*.

(1) *Jâm'aa-ush-Shittât.* Even the *Sharâya* which represents the literal and archaic section of the Shiah school says that the "Jurists are inclined to modify the strictness of the rule regarding the *wakf* of *dinârs* and *dirhems*."

(2) *Jawâhir-ul-Kalâm*, Chapter on *wakf*.

depends on the former, and in the *Sharh-i-Lum'aa* the only condition required is sound understanding.

"The creation of a *wakf* is like the performance of devotions, and, therefore, as there is no obligation on a lunatic, and an infant who has not attained puberty, to perform any devotion, their *wakf* too is not valid, for the understanding necessary to the comprehension of its nature and effect is wanting. But there is some difference of opinion regarding the question what would be the effect of a *wakf* when made by a boy who has attained puberty at an early age, say ten years." Presumably his act would not be valid, for the law does not presume discretion until the completion of the 15th year.

Wâkif can retain the superintendence in his own hands.

The *wâkif* can lawfully retain the superintendence of the *wakf* in his own hands or appoint another; but no condition which would enable the *wâkif* to revoke or cancel the trust is valid or lawful. Nor can he reserve to himself the power of resuming the *towliat* whenever he likes after already appointing one to the office.(1) As it is required that the *nâzir* or superintendent should be a man of honesty and should know how to perform his duty if the *wâkif* is incompetent or dishonest, that is, neglects the trust or misdeals with it, he may be removed, or another man may be associated with him.(2) When the *wâkif* has appointed no one for the superintendence of the *wakf*, the power of appointing a trustee devolves on the beneficiaries, when the *wakf* is for specific persons who can appoint a trustee on their own behalf, and on the *Hâkim-ush Shar'aa* (Judge), when it is for a public purpose, or in the way of God, or for a continuing and variable class of people.

Conditions relating to the *cestuis que trustent* appointing a trustee.

Section IV.

Conditions relating to the *Mowkoof-Alaih* or *Cestui qui trust.*

The *mowkoof-alaihim* or beneficiaries.

Concerning the (first) *moukoof-alaih* there are four requisites:—

(i) He must be existent.(3)

(1) This view seems opposed to that taken in the case of *Hedaitunnissa*, 2 N.-W. P. Reports, p. 410.

(2) This subject has been fully dealt with in dealing with the Hanafi Law. There is no difference between the Hanafi and the Shiah lawyers on this point.

(3) The *Mafâtih* states the rule thus: "it is required that the object in whose favour the *wakf* is made be in existence or held to be so or one whose existence is usually possible."

(ii) Must be capable of owning property.

(iii) Must be *m'uayyin* or specified.

(iv) Must be one in whose favour it is not unlawful to make a *wakf*.

Conditions relating to the *mowkoof alaihim* or beneficiaries—(contd.)

As a corollary to the above principles, the *Sharâya* lays down the following doctrine: "Consequently if one should make a *wakf* beginning with a person not in existence—as for instance, one to be born, or a fœtus not yet separated from the womb of its mother—the *wakf* would not be *sahîh* (valid). But if it were in favour of one not in existence, in succession to a person actually in being, it would be *sahîh*." The comment of the *Jawâhir* on this passage is interesting, and brings into prominence the views of the Shaikh (the author of the *Mabsût*) on the subject:—"If one makes a *wakf* for a non-existent person at the commencement, it will not be *sahîh* [according to the *Sharâya*]; for example, a person makes a *wakf* for his child about to be born, or the fœtus which is not separated from the womb, though (in one aspect) it is *mowjood* or existent, and bequests in its favour are lawful and it is entitled to a share upon the partition of the inheritance, yet a *wakf* is not valid in its favour," probably on the ground that it is not capable of holding possession of the property, "but where a *wakf* is in favour of a non-existent object in succession to an existing object which is capable of participating in its benefit, such *wakf* is valid."

Wakf commencing with a non-existent object.

When a person makes a *wakf* commencing with a non-existent object and then in favour of an existing object, according to the Shaikh and his followers, it would be valid in favour of the existing object and invalid as regards the non-existing. For example, a *wakf* in favour of an unborn child and after it for the existing children or for the poor will take effect at once in favour of the latter, the invalidity of the *wakf* in respect of the former object which is non-existing, only accelerating its operation in favour of those that are in existence. According to the *Jawâhir-ul-Kalâm* the great jurist Yahya ibn Muwayyid holds the same view, which is apparently conformable to the opinions entertained by a large body of the *'ullâma* (the learned).(1) But a man may make a *wakf* in favour of an existing object, and

(1) *Jawâhir ul-Kalâm; Mabsût; Ghunya.*

lawfully condition that upon certain other person or persons coming into existence, the benefit will go to him or them.

For example, a person, who has no children at the time, may lawfully dedicate his property in favour of *A*, and condition therein that upon his having any children the *wakf* would be for them and for their descendants, in which case the moment a child is born to him, the *wakf* would be diverted from *A*, and the benefit would be applied to such child.(1) What the law requires is, that the commencement in a *wakf* should be made with an existing object, though the remainder may be given to any number of non-existing objects in succession. This, it will be seen, is different from the Hanafî Law, which declares that a *wakf* may commence with a non-existing object, and that until it has come into existence, the *wakf* will be applied for the poor.(2)

Wakf in favour of one's descendants.

It will also be seen from the above that a benefaction in favour of one's children or descendants is absolutely valid.

A *wakf* for *masâlih*.

A *wakf* for *masâlih*(3) or works of general utility or for pious or charitable purposes of a *general* character, is valid, "as such a *wakf* is in truth, a settlement on all Mussulmans though some only participate in its benefit." For example, a *wakf* for (constructing or maintaining) bridges and mosques, providing shrouds for the dead, and like purposes is a settlement on all mankind, though a limited number may participate at a time in its advantages; and though no specific individuals may be mentioned as the people for whose benefit such *wakf* is created, it would be valid, because all God's creatures can derive benefit therefrom. Consequently, a *wakf*, the object of which is to confer a general benefit on the public, for example, a *wakf* to a *madrassa* or college, or the *wakf* of books to a library and such like, is valid.

A *wakf* in favour of a *harbi* invalid.

A Moslem cannot make a *wakf* in favour of an *alien enemy*, though he may be a blood-relation, but he can make it in favour of a non-Moslem subject (*zimmi*) of the same sovereign, whether he be a stranger or related to him, for it is the conferring of kindness or charity on a human being, who may be induced to take the right way. The validity of a *wakf* to a *zimmi* is maintained

(1) *Sharâya*, p. 245; *Mafâtîh*; *Jawâhir-ul-Kalâm*.
(2) *Sharaya*, pp. 235 and 236; *Mafâtîh*.
(3) Pl. of *maslahat*.

on the ground that a *sadakah* or charity may be validly given to him, and also because there is precedent for it, "for Safia, the Prophet's wife, made a *wakf* in favour of her brother," who was a Jew. But it does not follow from this that a Moslem can make a *wakf* in favour of a church, a synagogue or any place of non-Moslem worship, for that would be assisting in the propagation of "infidelity," which is unlawful and forbidden to Moslems. But a *zimmi* can make a *wakf* on a non-Moslem place of worship. A Moslem can make a *wakf* for the benefit of *zimmis* for purposes which are lawful under the Mussulman Law, such as the repair of their houses, erection of hospitals, or places of refuge, &c. So can non-Moslems make a *wakf* in favour of a Moslem place of worship.

A *wakf* for sinful purposes invalid.

"A *wakf* in favour of fornicators, highway robbers or drinkers of wine is not valid, nor for the copying of what are now called *Tourât* and *Injîl* (the Pentateuch and the Christian Gospels) since they are altered and perverted. But if such appropriations were made by an infidel, it would be lawful. No *wakf* which is productive of sin is valid."

A *wakf* for the poor.

If a Moslem were to make a *wakf* in favour of the poor, it would be applied primarily to the benefit of the Mussulman poor, and if there happen to be none, then to other poor; but a *wakf* by a non-Moslem in favour of the poor generally would be applied for the benefit of the poor of his neighbourhood without distinction of creed.

A *wakf* in favour of Moslems generally.

When a *wakf* is made in favour of Moslems generally, all people who are subject to the laws of Islâm, their women and their children, will be included; the use of the expression "Moslem" excludes those who are not subject to Islâm. A *wakf* in favour of *mômins* (those who have the *Imân* or true faith,(1) will be applied only for the benefit of the followers of the twelve Imâms.

A *wakf* in favour of *momins* generally will be applied to such purposes as would be beneficial to them.

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(1) "Faith has two meanings—(1) general, and (2) special; generally it means to accept from the heart those laws which the blessed Prophet has brought; the special meaning resolves itself into two heads:—(*a*) acting piously, and (*b*) believing in the *Imâmate* of the Imâms."

"If the *wakf* is for *Shiahs*,(1) then, according to our present usage, it will be applied for the benefit of the *Imâmias*. The term *Shiah* includes the *Jârudiahs*, the *Ismailias*, and the *Zaidias*."(2)

Wherever the *mowkoof-alaih* (*i.e.*, the person in whose favour a *wakf* is made) is described by a particular relationship, all those who come within it are held to be included in the benefits of the *wakf*.

"So that if the *wakf* be in favour of the *Imâmias*, it is for all the followers of the Imâms. In like manner, when it is for the *Zaidias*, all those who assert the Imâmship of Zaid, the son of Ali (the second) are included. Likewise, when the connection is relationship to a particular ancestor, all those lineally descended from him by their fathers are included. As, for instance, 'Hâshimis,' comprehend all those descended from Hâshim through Abû Tâlib, Hârith, Abbâs and Abû Lahab; and 'Tâlibis' comprehend all descendants of Abû Tâlib, on whom be peace, both males and females participating if connected with him on the side of their fathers from a regard to custom, though upon this point there is some difference of opinion."

If one should make an appropriation for an indeterminate class of people like the Banî Tamîm, the correct opinion is that it would be valid and should be applied to any of them who can be found.

Wakf in favour of neighbours.

If a person should make an appropriation for (his) neighbours (*jîrân*), a reference should be made to custom for determining who are to be thereby comprehended.

"Some say, however, that any one whose house is within forty cubits is a neighbour, and this opinion is well supported, while others maintain that the meaning of the term extends to all the occupants of forty houses on either side, but this opinion is now abandoned."

A *wakf* in favour of a *maslahat* that has ceased to exist how to be applied.

If one should make a *wakf* for a *maslahat* or object of general utility, when that has ceased to exist, it will, according to the approved doctrine, be applied to any good or pious purpose. It would, however, be better to apply the same with reference to the true intentions of the *wâkif*. So a *wakf* for a mosque will (in case the intended mosque is not in existence) be applied to another

(1) *Jawâhir ul-Kalâm*—"Shiah means a person who propagates the Imâmat of Ali, may the peace of God rest with him."

(2) See the *Spirit of Islâm*, (Ed. 1902), pp. 293-4.

mosque, and that for a madrassa to another like madrassa, and so on, regard being had to the same description of object as was intended by the *wâkif*.(1)

When a *wakf* is made for a good purpose without any specification of the object, it will be applied to any good purpose by which an "approach" is made to Almighty God.(2)

So also in the *Sharh-i-Lum'aa*:—"If one makes an appropriation in 'the way of God,' it will be applied to every purpose by which an 'approach' is made to God, because from 'the way' is meant the path of God, that is, the path of reward [in future life] and the reward and pleasure of God; this will include, therefore, helping the needy, building mosques and repairing roads, supplying shrouds for the dead, and whatever brings blessings; some say, it includes holy warfare, others that it includes *Hajj* and *'Umrah* (lesser pilgrimage). But the first view is correct.(3) Similarly, if one makes an appropriation in the way of charity or in the way of *sawâb* (reward), it means the same thing, and the meaning will not be split into two parts. Some [jurists] have said that 'the way of reward' means the poor and indigent, and commencement should be made with his poor relations, and by the 'way of charity' is meant also the poor and indigent, and travellers and debtors who have become indebted in pious acts and the ransoming of slaves, but the intention of the *wâkif* should always be regarded."(4)

Dedication for charity generally.

"If one makes a dedication for charity generally, without any specification of the purposes, it will be applied (or expended) on the poor and all purposes by which an approach (to God) might be made, like conferring benefit on students, building mosques and schools and bridges and *mashâhid* (mausoleums), assisting pilgrims, supplying shrouds for the dead, and it is allowable to spend for the general benefit of Mussulmans."(5)

In the *Jawâhir* this principle is stated thus:—"If a person constitute a *wakf* for a *maslahat* such as a masjid, a bridge or some object of a similar character and all traces of its use and effect have totally vanished (*lit.* have become effaced or annulled),

(1) *Mafâtih.*
(2) *Sharh-i-Lum'aa.*
(3) *Mafâtih.*
(4) Comp. the *Jawâhir ul-Kalâm*, Chapter on *Wakf.*
(5) *Riyâz-ul-Ahkâm.*

in such a case the income of the *wakf* property would be expended on good purposes generally. Preference, however, would be given to an object approaching in character as nearly as possible to the object of the original dedication." It will be seen from this that the *cyprès* doctrine is carried much further under the Shiah than even under the Hanafî Law. This will appear more clearly from the following dictum: "If a person were to make a dedication generally for benevolent purposes,(1) then without any difference of opinion, the *wakf* property will be applied for the benefit of the poor and indigent, and for all pious acts and objects which may be the means of approaching the Deity; *birr* or charity is a word which comprehends all good and pious actions (*khair*), such as the relief of the *wâkif's* kindred, the help of the poor, the assistance of the weak, the improvement of the condition of the Mussulmans, the performance of *Hajj*, *Jihâd*, &c."(2)

Ibn-i-Junaid's view.

With the exception of Ibn-i-Junaid, most of the writers are agreed in holding that a dedication, when the object is not mentioned either expressly or impliedly, is void. Ibn-i-Junaid, however, holds otherwise. According to him and his followers where a *wakf* is created but the beneficiaries are not named, the *wakf* will be applied for purposes of *birr* and *ihsân* (charity and good acts). But when a person declares a property a *sadakah* in the way of God (which is another way of saying it is a *wakf*), though he may not mention the people for whom the *sadakah* is constituted, yet it would be applied by *consensus* to the benefit of those whom God has declared to be the recipients of the ordained alms, *i.e.*, the poor and the indigent, the needy and the helpless. Virtually, the views of Ibn-i-Junaid are not opposed to those of the other jurists, for they also hold that in the absence of any express mention of the special object, where the *wakf* is clearly for pious and good purposes, it will be applied to such purposes as are for the good of Mussulmans generally.(3)

A *wakf* for an indeterminate object invalid.

If the *wakf* is created for an indeterminate object it is invalid: *e.g.*, if it is for one of two mosques or for one of two *imâmbâras*, and there is no specification for which mosque or *imâmbâra*, it is void.

(1) *Jawâhir ul-Kalâm*, Chapter on *Wakf*.
(2) *Ibid.*
(3) *Ibid.*

If a person were to make a *wakf* for his children or his brethren or his relations generally, the males and females, the nearer and the more remote, will share equally,(1) unless the order in which they should participate is specified, or it is expressly stated that it is for the males, when the shares will be distributed in accordance with the rule laid down. Where a *wakf* is for paternal and maternal uncles together, they share equally. A *wakf* for those "nearest to the *wâkif*" will be primarily applied to his parents and descendants, then to his brothers and sisters and their descendants, together with the ascendants, and lastly, and on failure of these, to paternal and maternal uncles and their descendants. As in the Hanafî system, so also under the Shiah Law, the directions laid down by the *wâkif*, if not sinful, should be given effect to so far as possible. But if any of the provisions are unpracticable, the *Hâkim ush-Shar'aa* (the Judge) can give directions so as to make them conformable to the exigencies of the *wakf*.

A *wakf* in favour of relations generally.

Section V.

Essential Requisites to the Legality of a Wakf.

There are four essential requisites on which depends the legality of a *wakf*.

(i) That it must be perpetual.

(ii) That it must not be contingent.

(iii) That possession must be given of the thing dedicated, or, more properly, the property should cease to be the property of the donor.

(iv) That the right of the donor should be entirely divested therefrom.(2)

Conditions requisite to the legality of a *wakf*.

Perpetuity.—With reference to the first condition, the view generally adopted is, that in order that a *wakf* may take effect in *perpetuity* it must be for an object or objects, which, individually or collectively, would presumably last always. A *wakf* for *masâlih* or works of general utility or for pious and benevolent purposes generally, is valid, for any particular *maslahat* which is for the benefit of all mankind is lasting in its character, as it is for

(1) *Jâm'aa-ush-Shittât.*

(2) *Haji Kalb Hossein* v. *M. S. Mehrun Bibi*, 4 N.-W. P., 155.

the benefit of humanity at large. A charitable purpose is also perpetual in its nature, for the poor are always in existence. In fact, any continuing object of *birr* and *ihsân* is sufficient for a perpetual *wakf*; for example, a *wakf* to supply water or *sherbet* to the congregation in the mosques or *imâmbâras*, to light the lamps in a place of worship, to keep up the library of a madrassa (college), to wage a sacred war, to support the poor Syeds of Kerbela, to keep in repair the aqueduct there or in any other sacred place and such like.

Wakf in favour of descendants and on their failure for the poor, valid by consensus.

So, also, where a *wakf* is created for specific objects which are liable to failure, if the ultimate reversion is for the poor or for any object of utility or a place of worship such as a mosque or *imâmbâra*, the *wakf* is valid. For example, if a *wakf* is created for the descendants of the *wâkif*, and upon their extinction, it is provided that the usufruct should be applied to the poor, or towards a particular mosque, the *wakf* is valid "without difference."

But when the *wakf* is for Zaid, and nothing is said as to how it should be applied after Zaid's death, and there is nothing from which the intention of the donor can be inferred as to the future application of the proceeds of the *wakf*, one body of jurists have held that, in that case, the *wakf* will operate only as an *'umra*(1) during Zaid's lifetime, and on his death will, according to the generally received doctrine, revert to the *wâkif* or his heirs, as the case may be. Similarly, if the *wakf* was for Zaid and his descendants, and no other (continuing or permanent) purpose was mentioned, to which the income should be applied upon the extinction of Zaid's posterity, the *wakf* will take effect as a *hubs*(2) in their favour, giving them a limited estate so long as they are in existence. And on the extinction of Zaid's descendants the property will revert to the heirs of the *wâkif*. According to another school of jurists, the remainder in either case will be for benevolent purposes in general.(3) These jurists are in agreement with Abû Yusuf.

If a property is made *wakf* or *hubs* for two persons, one of whom dies, the survivor will enjoy the benefit of the property

(1) An *'umra* means a life-grant.

(2) *Hubs*, lit. tying-up of property, means a settlement in favour of an individual or individuals for a limited time.

(3) *Jawâhir ul-Kalâm*, Chapter on *Wakf*.

during his lifetime. Another view is, that the moiety of the deceased will revert to the donor. But the former doctrine seems more approved.

A *wakf* for the donor's son for one year or for his lifetime, with the reversion for the poor, is valid (as a perpetual *wakf*) by *general consensus*.

If a person were to constitute a *wakf* for his sons in the following manner, that is to say, for one year for 'Amr, the next year for Zaid and so on, and after them for the poor, in the following manner—for their learned, one year, for their pious in the second year, and for their *mashâikh* in the third year, such a *wakf* is valid and will be given effect to.

A Contingent Wakf.—A *wakf*, the operation of which is made dependent upon a future contingency, is invalid under the Shiah Law. In the *Sharâya*, the principle is stated in these words :—"If a *wakf* is restricted to a particular time or made dependent on some quality of future occurrence it is void." In the *Mafâtih* and the *Irshâd ul-Azhân* the doctrine, thus stated in the *Sharâya*, is more clearly laid down : "Without difference of opinion *wakf* should be made at once ; it cannot be made to depend on the occurrence of an event in the future unless the same be certain and positive." Similarly in the *Sharh-i-Lum'aa*, "besides the above-mentioned matters, *tanjîz* is one of the conditions of *wakf*. Meaning of *tanjîz*. Therefore, if the *wâkif* has suspended it upon any contingency or quality [of future occurrence] it is invalid except in cases where the contingency is only in the form of the expression used but none in reality and the *wâkif* is aware of it, such as his saying 'I have made this *wakf* if to-day is Friday,' and such is the rule in regard to other contracts." In the *Mabsût* and *Ghunia* also, the principle is stated in almost similar terms, the effect of which is that if a *wakf* is made dependent for its operation on the happening of an uncertain contingency, it is void.(1)

(1) "So if *wakf* is restricted to a particular time, or made dependent on some quality of future occurrence, the *wakf* is void. Such also is the case when it is made in favour of persons who will probably fail. As for instance, if one should make a settlement on Zaid with a restriction to himself or extend it to generations that would probably fail, or if he say generally for his successors without mentioning what is to be done after they fail—in these cases it is maintained by some that the *wakf* should be entirely void, but *others insist that due course should be given to the purposes actually named and this is approved.* Then upon their failure the property would revert to the heirs of the *wâkif*, but some

Syeda Bibi v. *Moghul Jan.*

The Allahabad High Court, in the case of *Syeda Bibi* v. *Moghul Jan*,(1) has carried the doctrine of *tanjîz* to its furthest limit. A Mahommedan of the Shiah sect had executed a *wakf-nâmah*, in which he declared that the deed of *wakf* shall come into force from the date of its registration. The learned Judges held that the condition was repugnant to the doctrine of the Shiah Law, and the *wakf* was therefore invalid.

In the case of *Hamid Ali* v. *Mujawar Husain Khan*,(2) it appeared that a Mahommedan of the Shiah sect had executed a document by which, after dedicating his properties to Hazrat Imâm Husain, and declaring that the ownership of the same as *mutwalli* should belong to him during his lifetime, he proceeded to say :—" I shall reduce into writing in detail and specify the powers which I possess in respect of the management of the *wakf* property in a separate will which should always be acted upon after my death." On the same day he executed the will in which he laid down certain rules of practice.

Seisin under the Shiah Law.

In a suit brought by certain persons for the removal of the defendant No. 1 from the office of *mutwalli* and for a declaration that the property was not saleable in execution of a decree against him, the first Court held that, although the *wakf* was valid, it had never been acted upon. Upon appeal the learned Judges of the High Court came to the same conclusion, though upon somewhat different grounds. The Chief Justice was of opinion that the *wakfnâmah* was an imperfect dedication of the property according to the Shiah Law, " for, although the donor purported to dedicate the property when he executed the *wakfnâmah*, and also purported to assume possession of it as *mutwalli*, no definite objects existed for which he was to hold possession. The *wakfnâmah* was designed not to take effect until the death of Faiyaz Ali, although it assumed in some respects the form of a disposition *inter vivos*."

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of the doctors maintain that it reverts to the heirs of the *mowkoof-alaih*, or the person in whose favour the *wakf* is made. The first opinion, however, is the most approved." *Tanjiz* means immediate operation.

" If one should say, 'I have dedicated when the beginning of the month should come, or if Zaid will arrive,' the dedication will not be valid."

(1) (1902), I. L., 24 All., 231. It is submitted with respect that the condition in this particular case did not amount to the postponement of the *wakf* until the Registration; it only gave expression to the *wâkif's* intention that the *wakf* should take effect when the deed can have legal operation under the law.

(2) (1902), I. L., 24 All., 257.

Mr. Justice Burkitt, on the other hand, held that "the appropriation, if valid, was complete under the terms of the first part of the *wakfnâmah*, and that it was not nugatory as being a testamentary *wakf*," but, as it was never acted upon, the *wakf* purported to be created thereunder was invalid.

SECTION VI.

DIVESTMENT OF THE WAKIF'S INTEREST.

Divestment of the *wâkif's* interest.

On this subject, the Shiahs differ from the accepted Hanafî doctrines and approach closely the views expressed by Imâm Mohammed.

"Seisin is a condition for the validity of the *wakf*," says the *Sharâya*, "so that if one should make a *wakf* and die without giving possession, the subject of it would be his inheritance."(1) The nature of the seisin will depend on the nature of the subject of the *wakf* and of the objects for which it is dedicated. If the dedication is for specific individuals who are *sui juris* and competent to take possession of the *wakf*, seisin is essential. But it does not follow from this that there should be actual delivery of possession. What is required is that there should be a transmutation of proprietary right. If a trustee is appointed, he should take possession of the property. If the *wâkif* himself is the *mutwalli*, he should hold as such.

"If, however, one should make a *wakf* in favour of his minor children, his own possession would be possession on their behalf."(2) The same principle applies to a *wakf* by a grandfather, or any person in whose guardianship the children are.

The possession of the executor of the *wâkif* is effectual seisin in law.

Where the *wakf* is for pious purposes or for the benefit of mankind in general, no seisin is necessary. The *Sharâya* states the principle thus:—"Where a *wakf* is made for the poor or for the learned in law, a superintendent (*kyyum*) must be appointed to take possession of the *wakf* property—while in the case of a *wakf* made for a *maslahat* the creation of the trust is sufficient, the

(1) *Sharâya-ul-Islam*, p. 236.
(2) *Ibid.*

condition of acceptance being entirely dispensed with, and as to possession that of the *nâzir* or superintendent is sufficient."

"If a person should dedicate a mosque or place of worship, the dedication is effectual though only one person should pray therein. In like manner, if a person dedicate a cemetery, the same becomes operative by the interment therein even of a single corpse. But though people should pray in a mosque or bury in a cemetery without the formal words of *wakf* being pronounced, neither would pass out of the property of the owner until it is formally dedicated."(1)

Where only appropriate words have been used, but no change in the character of the possession has taken place, the *wakf* would not be operative.

Wakf for the *wâkif's* minor children.

The possession of the *mutwalli* appointed to look after the *wakf* would be sufficient, and the *wâkif* may himself be the *mutwalli*.(2)

As already stated, where the *wakf* is for the *wâkif's* minor children, no express transmutation of proprietary right is necessary, and if the *wâkif* remains in possession, his possession would be on their behalf.(3)

A *wakf* in favour of one's self not valid under the Shiah Law.

Divestment of interest.—With reference to the fourth condition, it will be observed that there is a marked difference between the Shiah and Sunni Law on the subject. According to Abû Yusuf, a *wâkif* is entitled to reserve for himself an interest in the *wakf* property, or as he puts it "to eat thereout." Under the Shiah Law, in order that a *wakf* may be valid, it is necessary that there should be no reservation of interest in favour of the *wâkif*. "If a person were to make a *wakf* for himself," says the *Jawâhir*, "it would not be valid; this is without any difference of opinion. Similarly, a *wakf* commencing with the *wâkif*, *e.g.*, for the *wâkif* and then for another, will be invalid, though some, among them the Shaikh, have held that it would be invalid only as regards himself. The former opinion seems to be generally adopted." "Similarly, if the *wakf* were made in favour of another with a condition for the payment of the *wâkif's* debts and currents expenses, it would not be valid. This is supported by

(1) *Sharâya-ul-Islâm*, p. 237. (2) *Jâm'aa-ush-Shittât.*
(3) According to Mohammed ibn Muslim.

the answer of Abu'l Hassan (the Caliph Ali) (may the blessing of God rest on him) to the letter of Ali bin Sulaimân who wrote to the Imâm thus :—'May I be your sacrifice; I have no children, and I have some lands which I have received from my father. I intend to dedicate the same for my poor and weak brethren; if I make a *wakf* in my lifetime, can I eat therefrom whilst I live?' To this the reply was, 'I have received thy letter and learnt its purport; if thou shouldst make a *wakf* of thy lands and make a condition to eat therefrom, it will not be valid. If thou hast heirs, sell the land and give a portion (of the proceeds) to the poor, or reserve a portion which may be sufficient for thy support during thy lifetime and dedicate the remainder.''

The following from the *Jâm'aa-ush-Shittât* throws considerable light on this subject—

''*Q.* When a person makes a *wakf* of some property in this way, *viz.*, 'I have constituted this a *wakf* in perpetuity, and its *towliat* I have reserved for myself during my lifetime, and after my death for the eldest and fittest of my children in succession, generation after generation (*batnan-b'aad-batn*), and I have appointed that the rents and profits of the *wakf* property after paying all royal taxes and costs of collection, I shall apply for my expenses; and after my death, one-tenth of the said rents and profits, after deducting the taxes and costs shall be given to the *mutwalli* for his remuneration, and the remainder divided among my children equally, but the share of my daughters shall not go to their children;' and some time after the *wâkif* died leaving three sons and the sons of predeceased sons, will his grandsons take any interest in the *wakf*, &c.?''

''*A.* This *wakf* is void *ab initio*, for the *wâkif* reserved to himself during his lifetime the profits of the property. It is one of the conditions for the legality of a *wakf* that the *wâkif* should take out the subject of the *wakf* from himself. Therefore, when a *wakf* is made on his own *nafs* (self) it is *bâtil* (void), though there are others mentioned after himself as the beneficiaries thereof. With reference to the voidableness of the *wakf* as to himself there is consensus; as regards the voidableness of the remainder, the general opinion is that it is so, for the arguments in support of the validity of the *wakf* in favour of the others are weak. Similarly, if he were to make a *wakf* and stipulate to defray his every-day expenses

Divestment of the *wâkif*'s interest.

Wakf in favour of one's children and descendants valid.

or to pay his debts thereout, it would be invalid. *But a condition that his people and children and family should eat out of the wakf is valid*, as is apparent from what was done by the Prophet and his daughter (may the blessings of God rest on them both), and in this respect there is no difference between those who are entitled to maintenance and those who are not. In the same way, it is lawful to fix the allowances of *mutwallis* and *nâzirs*, or to give them permission to eat out of the *wakf* and supply others with food. And in the *Masâlik* it is clearly laid down that when the *wâkif* is himself the *mutwalli*, it is lawful for him to eat out of the *wakf* [as a *mutwalli*] and this 'eating' does not fall within the category of a provision for the *wâkif's* own benefit. The author of the *Kijâyah*, however, doubts whether the *wâkif* can 'eat' out of the *wakf* in this way. It must be admitted that considerable difficulties surround this point, and on this account many people question the lawfulness of the *wâkif* taking any share even as *mutwalli*. For example, a person makes a *wakf* of some property on his children, and conditions that the *towliat* should remain in his hands during his lifetime, and after his death it should go to the fittest among them, and the *wâkif* also conditions that nine-tenths of the profits of the *wakf* should belong to him by right of *towliat*, and the remaining tenth should be given to the children, and that after his death one-twentieth should be given to the fittest of the children by right of *towliat*, and the balance of the income be divided among them equally,—in such a case as this, my view is that the *wakf* would not be valid. Admittedly, it is lawful for the *wâkif* to retain the *towliat* in his own hands during his lifetime, and also to condition that the *mutwalli* should feed himself and others from out of the *wakf*. From these two theses some of our jurists have drawn the conclusion that where the *wâkif* has made a condition for the *mutwalli* for the time being to feed himself and others out of the *wakf* and the *wâkif* happens to be the *mutwalli*, it is lawful for him to eat thereout, though a few have doubted the lawfulness of his doing so. The result is, that the legality of the *mutwalli* eating out of the *wakf* depends on his quality as *mutwalli*, and not upon the fact of the *wâkif* being the *mutwalli*. And the jurists are agreed that where anything has been fixed for the *mutwallis* generally, it is lawful for the *wâkif*, when he happens to be the *mutwalli*, to take so much as is fixed for the other *mutwallis*;

but I have nowhere seen that it has been held that a *wâkif*, whilst he is the *mutwalli*, can lawfully take for himself anything he likes out of the *wakf* simply because he himself is the *mutwalli*. The meaning of this is, that the retention of such a general power which would authorise his taking the largest share for himself, leaving almost nothing for the beneficiaries, is contradictory to the condition which requires a complete divestment of all proprietary right on the part of the *wâkif*. This, of course, does not apply to a person who has made a *wakf* for the indigent and has himself become poor, or where he has made a *wakf* for the learned and has himself become learned. In such cases, the *wâkif* would be entitled to participate in the benefits of the *wakf*, and it makes no difference whether at the time of the *wakf* he is a *fakîr* or learned, or whether he becomes so afterwards. But if he makes a condition that he, as a *fakîr*, should participate in it, it would not be valid. The result is that where a *wakf* is made for a general purpose (*jihât-i-'aâmma*), a *wâkif* may lawfully participate in it."

But the *wâkif* when *mutwalli* can lawfully take the allowance reserved for the trustees generally.

From the above passage, it is clear that the *wâkif* can lawfully take the allowance fixed for the *mutwallis* generally, when he himself holds the office.

There is another case given in the *Jâm'aa-ush-Shittât* which deserves equal attention with the above as explaining the question how far a *wâkif* may reserve to himself any interest in the *wakf* property.

"*Q.* One Zaid makes a *wakf* of six dams of a certain property and six dams of a certain mill and executes a *wakfnâmah* which is attested by one of the *mujtahids* of the time, who is dead. The purport of the *wakfnâmah* is as follows:—out of the *wakf* four dams should be for the benefit of the *wâkif's* male children, generation after generation; should there be no male children then for the female children in perpetuity; two dams to be devoted to the following purposes, *viz.*, for the expenses of the sacred months of Rajab, Shâbân and Ramazân, in such a way that the good resulting from such disbursements may be for the soul of the *wâkif*, and during the first two months fifteen Koran-readers should be entertained, each of whom should read four parts of the Koran, and, after the death of the *wâkif*, they should offer prayers and fastings for the soul of the *wâkif*, and that during his lifetime the *wâkif* should be *mutwalli* thereof, and after his death his eldest son should

be the *mutwalli*, and so on ; that during his lifetime he should take $\frac{12}{20}$ths of the proceeds by virtue of the office of *towliat*, and $\frac{1}{20}$th should be given to the children, that after his death $\frac{1}{20}$th should be given to the *mutwalli*, and the rest distributed among his children. Is such a *wakf* valid ? ''

"*A*. This question cannot be answered without its being discussed in three aspects—

"If the document, the purport of which has been given above forms the only evidence of the conditions of this *wakf*, then it must be pronounced to be wanting in legality on several grounds ; (*a*) with reference to the dedication of the two *dâms*, it would appear that it does not come into operation until after the death of the *wâkif*, for the directions given as to the mode of application of the proceeds thereof take effect only as a testamentary provision upon his death, since the *wâkif* declares that the income thereof should be applied in entertaining Koran-readers, feeding the poor, performing prayers, &c., upon his death for the benefit of his soul. But it is a condition for the legality of a *wakf inter vivos* that it should have operation immediately. In the present case, the *wakf* of the two *dâms* is dependent upon the death of the testator ; in fact, there is no one entitled to the benefit of that portion unless it be presumed that it is the *wâkif* himself, which would be invalid. And if it were said that the proceeds of the two *dâms* should be applied to charity in general until the death of the *wâkif*, and after his death should be applied to the Koran-reading, &c., mentioned by him, this is clearly opposed to the purport of the *wakfnâmah* itself. The *wakf*, therefore, is clearly invalid, as it is a *wakf* virtually in one's own favour.''

***Wakf* in one's own favour.**

Similarly, if one were to make a *wakf* and condition therein that out of the income thereof his debts should be paid, such a *wakf* would be invalid. But if a person were to convey his property in trust to sell the same and out of the proceeds to pay his debts and to invest the remainder for religious or pious purposes, or in erecting a religious building and maintaining religious observances therein, it would be a valid dedication.(1)

A *wakf* in favour of

If a person were to make a settlement on himself and the poor, only half the property would be validly dedicated, and with refer-

(1) Comp. *Haji Mohammed Kazem* v. *Phudia Bibi*, supra.

ence to the remaining half the *wakf* would not take effect. In the case of *Haji Kalb Hossein* v. *Musst. Mehrun Bibi*,(1) the Allahabad High Court enforced this principle. The decision in this case is so important that it may be usefully set out here *in extenso*

one's self and the poor.

Haji Kalb Hossein v. *Musst. Mehrun Bibi.*

In the year 1851 one Mussamat Sahibzadee executed a deed by which she appropriated certain moneys and estates, of which she was possessed, to certain religious and other purposes in the following manner, *viz.*, she appropriated two-thirds of the income to herself during her lifetime for her necessary expenses, and the remaining one-third of the income she declared divisible into fifty-five shares, of which some were to be distributed to certain persons therein mentioned, charged with religious duties, and the residue was to be expended on religious ceremonies, which were specified. She appointed herself trustee, and declared that the fifty-five shares as detailed would remain appropriated during her trusteeship, and that neither she nor her assignee, nor representative should have power to transfer the property so appropriated; and she declared further that after her trusteeship, the trustee who might succeed to her should, after discharging the Government revenue and other outgoings and charges of management, divide the balance of the income into 165 shares, and retain 55 shares on account of his trusteeship, and apply the remaining shares as therein directed to the payment of pensions to persons therein mentioned, for the performance of religious duties, and to certain specified religious purposes. By this deed one share out of the 55 shares in the income of the property was to be paid to the plaintiff, who was the respondent in the High Court, during the lifetime of the settlor, and 10 shares out of the 165 shares into which the income was to be divided on the expiry of the settlor's trusteeship, were to be paid to her, and after her death, to her heirs, "generation after generation," subject to the condition that they performed certain religious duties therein particularised.

The settlor died in 1872, and the respondent, having failed in obtaining payment of the shares appropriated to her by the deed of 1851, instituted a suit to recover her allowance thereunder. The Lower Courts decreed the plaintiff's claim. In special appeal it was contended *inter alia* that the respondent ought, prior to the

(1) 4 N.-W. P. H. C. Reports, 155.

Haji Kaib Hossein v. *Musst. Mehrun Bibi*—(contd.)

institution of the suit, to have obtained sanction of the Court under section 18, Act XX of 1863. With reference to this objection the High Court held as follows :—"That section only prescribes the necessity for obtaining sanction when suits are instituted under that Act. This suit is not instituted under that Act: the respondent has instituted this suit to recover a direct pecuniary interest created in her favour by the deed of 1851. The Act, while it empowered persons to sue, whose right to sue independently of the Act may be doubtful, did not deprive persons in the position of the respondent of the right to sue, which they have independently of the Act, nor did it impose on them the necessity of obtaining sanction of the Court for the institution of this suit. Moreover, the Act refers to foundations to which, at the time the Act was passed, the provisions of Regulation XIX of 1810 were applicable; and it appears to us that to the trust created by the deed of 1851 the provisions of that Regulation were not applicable. The management of the trust-estate had never been assumed by the Government officer, nor was the nomination of the trustee, at the time the Act was passed, vested in the Government or a public officer, nor was the nomination of the trustee subject to the confirmation of Government or any public officer. The nomination of a trustee may hereafter in certain events become vested in a public officer, but these events have not yet happened. We, therefore, overrule this objection."

The learned Judges then proceeded to deal with the principal objection in the following terms :—"It is contended that the deed of 1851 was not a valid deed of *wakf* according to the tenets of the Imamea sect, *first*, because Sahibzadee Begum remained in possession of the property as proprietor up to the date of the gift in 1867, and, *secondly*, because she reserved to herself a benefit out of the *wakf* property, in that she reserved two-thirds of the income for the necessary expenses during her lifetime. To constitute a valid *wakf* according to the doctrine of the Shiahs, it must be absolute and unconditional, and possession must be given of the *mowkoof* or thing appropriated, and it must be taken entirely out of the *wâkif* or proprietor himself. Firstly, then we have to consider whether possession was given of the appropriated property. The law allows the appropriator to appoint himself *mutwalli*, consequently inasmuch as the settlor appointed herself *mutwalli*, and

by her conduct subsequent to the execution of the deed of 1851 indicated that she held the appropriated property on the trust declared in that deed, we hold there was sufficient proof of possession to satisfy the requirements of the law; but we also hold that as to two-thirds of the property, the deed of 1851 did not create a valid *wakf*. The settlor reserved to herself the benefit of the income of two-thirds of the appropriated property, so much of the property she settled on herself for her lifetime, and consequently this case is not distinguishable from the cases mentioned in the *Sharâya*. It remains to be determined whether the invalidity of the deed of 1851, as a *wakfnâmah*, in respect of the two-thirds, renders it altogether invalid, or invalid only to the extent of the two-thirds. The *Sharâya* declares that where a settlement is made on another with a condition for the payment of the *wâkif's* debts, or necessary expenses, such a settlement is invalid. In that case the reservation is of an indefinite benefit; in the present case one-third of the income, a definite share was, as it appears to us, absolutely and permanently appropriated to purposes other than the temporal benefit of the settlor, and entirely taken out of the settlor, and inasmuch as the *wakf* of a *mushâa*, or undivided share in a thing is valid, we feel ourselves at liberty to hold that the deed of 1851 was valid to the extent of one-third of the income of the property; and that that share of the property is available for the satisfaction of the trust declared by the settlor to take effect after her trusteeship. Consequently the claim of the respondent must be reduced by two-thirds."

Haji Kalb Hossein v. *Musst. Mehrun Bibi* (concld).

Qualification to the rule.—Though it is not lawful for a *wâkif* to create a *wakf* in his favour, "yet if the *wakf* is in the way of God or for a pious or religious purpose, for example, a mosque, it would be lawful for the *wâkif* to derive benefit therefrom, *viz.*, to participate in the prayers held there and to offer his prayers in the place. Similarly, in the case of any other *wakf* of a public character, such as a bridge or hostel (*musâfirkhâneh*)." In other words the *wâkif* can avail himself of the benefit of the institution in the same way as any other member of the public.

In considering the validity of a *wakf* which is not of a public nature, and in the benefit of which the *wâkif* participates to a certain extent by implication, the important question to determine

Participation by the *wâkif* in the benefit of a *wakf*.

is whether the *wâkif* intentionally made a reservation in his favour of that interest. Apparently, the participation of the *wâkif* to a certain extent, which does not show that the *wakf* was a mere device for tying-up the property for the *wâkif's* own benefit, would not be invalid. This view is submitted as the result of the difficult and somewhat casuistical arguments discussed in the *Jawâhir-ul-Kalâm*.

If a person were to create a *wakf* and make a condition that the property should return to him in case of necessity, the condition would be valid and the *wakf* would be void, the transaction taking effect as a mere *hubs* or settlement; when the need arises the property would revert to the owner. The need must be such as is considered valid under custom and usage, but not anything technically called a need. When the property once reverts to the donor the right of alienation will attach to it,(1) and on the death of the owner the property will go to his heirs.

Valid conditions in a *wakf*.

A condition to the effect that the *wâkif* should have the power of excluding any one he liked from the benefit of the *wakf* is invalid. But a condition to introduce fresh beneficiaries is valid, except in the case of a *wakf* in favour of children.

When a *wakf* is for one's children generally, children born after the *wakf* will be included, though there may not be any express condition to that effect. But when a *wakf* is made for children and the property is made over to them, after-born children will not be included unless it has been so expressly provided.

When a *wakf* is made for the benefit of one's infant children, the donor will not have the power of so varying the terms of the *wakf* as to include outsiders in its benefit unless he has expressly reserved power to that effect.

Possession.

Seisin.—The seisin which is required is on behalf of the first beneficiary or *mowkoof-alaih* and all regard to possession ceases in the subsequent steps. As already stated, it is not necessary, however, that there should be any actual transfer of possession; what is required is a change in the character of the possession. For a *wâkif* may make a *wakf* and remain in possession as

(1) *Sharâya-ul-Islam*; p. 237. In other words the *wakf* in such a case takes effect as a settlement.

trustee for the beneficiaries of the trust; such retention of possession will not affect the legal character of the *wakf*.

As the provision requiring seisin on the part of the first *cestui que trust* relates to a change in the character of the possession, constructive delivery of possession is sufficient. As under the Hanafî Law, when the possession is already in the hands of the *cestui que trust* or of the trustee, no formal delivery of seisin is necessary. The former possession is sufficient to validate the *wakf*. For example, if *A* were to dedicate a property which is in his possession through an agent *B*, and were to appoint *B* as the *mutwalli* or trustee thereof, no further delivery of possession is necessary, the relation of *B* as agent ceases with the creation of the *wakf* and the property remains in his hands as a trustee.

The passage in the *Sharâya*, therefore, that "the seisin which is required is of the first *mowkoof-alaih*" must be read with due regard to the other circumstances. Nor is the seisin of the beneficiary or beneficiaries themselves necessary. Any one who is actually or constructively their agent may take possession of it. Where a *wakf* is made for a charitable or pious purpose of a public character, as in the case of an appropriation for the poor, for lawyers, for students and such like, it is out of the question for the entire body of beneficiaries to obtain seisin of the property; the possession of the superintendent appointed by the *wâkif* or in his absence of the Judge or of a curator appointed by him for that purpose, will be sufficient.

Wakf in favour of an object of public utility.

The *wâkif* can validly appoint himself as the *mutwalli* of the *wakf*. In the case of a *wakf* in favour of an object of public utility (*maslahat*) such as a bridge, a mosque and such like, acceptance is not a condition nor seisin of any specific person deriving benefit from such object is necessary. The seisin of a *mutwalli* or *nâzir* appointed for the purpose of managing or looking after the maintenance of the *wakf* is sufficient. When the *wâkif* has constituted a *mutwalli* or superintendent no reference is necessary to the Judge. In case of any question as to the validity of his appointment, the Judge, as the guardian of the interests of the Mussulman public, will appoint a *nâzir* or curator.

Dedication of a *masjid* or cemetery.

When a place or building is dedicated for prayers, it will become operative if prayers have been offered there even by one person. Similarly, a cemetery will become dedicated by the

burial of one corpse. It must, however, be borne in mind that the intention of the appropriator must be apparent. For example, the permission of the owner of a house to another person to pray therein, or even the continuous offering of prayers in a private house, will not convert the residence into a *masjid* or a place of worship. But if a person declares that he dedicates his house as a mosque and after that allows another person to pray therein, that would be sufficient to create a valid *wakf*.(1) Again, if a person were to erect a building of the customary type of a mosque, and allow another to offer his prayers therein, it would be sufficient, though there may be no express declaration constituting it a *wakf*. Mere interment of a corpse on a land or offering of prayers in a building without express or implied declaration of intention on the part of the grantor, will not be sufficient to constitute the land or building a valid *wakf*.

If a father or grandfather were to make a *wakf* of a certain property belonging to him, for his child or grandchild, and retain possession of it on behalf of such child notwithstanding that a *mutwalli* has been appointed, such possession is lawful, and will be regarded in law as the possession of the *cestui que trust*.

Dedication for pious purposes.

The beneficial interest in such properties as are dedicated for general charitable or pious purposes appertains to God, for there is no *mâl* (property) without a *mâlik* (owner), and inasmuch as there is no specific beneficial owner of such public trust, the property impliedly belongs to the Deity.

Wakf for one's children.

Where a *wakf* is made for one's children's children (*awlâd-ul-awlâd*), the children of daughters will participate with those of the son.

Where a *wakf* is made for one's children and *their* children, the descendants of the third generation will not be included, unless it can be gathered that the donor intended all his descendants to share in the benefit of the *wakf*.(2)

When a *wakf* is made for one's *awlâd* and *awlâd* of *awlâd* and their *awlâd*, all the surviving descendants share equally *per capita*,

(1) *Jawâhir-ul-Kalâm.*
(2) *Ibid.*

unless it is laid down that they should take *batn* (generation) after *batn*, when the *batns* will take in succession.

When a *wakf* is made for the *wâkif's* children generally, it will endure to the benefit of all the descendants of the *wâkif*; and upon their extinction *alone* the benefit of the *wakf* will go to the poor. *Wakf* on children.

When a *wakf* is made for a mosque which becomes ruined, and the village or *mahallah* (quarter) in which it is situated becomes deserted, yet the *wakf* will not cease, and the property will not revert to the *wâkif* notwithstanding that, barring the traces of the building, nothing else remains of the mosque. This doctrine says the *Sharâya* is accepted "among us" without a difference (1)

When a building becomes ruined, so that there are no traces left of it, the land on which it was situated will not go out (of the category) of *wakf*, and cannot be sold. The ruin of the building will not destroy the *wakf*, the characteristic of which is perpetuity.

The *wâkif* is authorised to make a proviso to the effect that the *mutwalli* shall have the power to sell the property and invest the proceeds to better advantage. In the absence of any such provision if it appears that its sale would be to the advantage of the *wakf* or of the beneficiaries by investing the proceeds in some other more profitable property, the *mutwalli* may validly sell it with the sanction of the Judge. Sale of *wakf* property.

When disputes have arisen among the beneficiaries, and it has become apparent that by keeping the property in its original form considerable injury will accrue to the *wakf*, sale also is allowed. Power to alter investment.

When a *wakf* is made for the poor, it will be applied to the poor of the place where it is situated, and such of those as are forthcoming to avail themselves of its benefit. The *mutwalli* has not to search for them and distribute the proceeds among them. Imâm Abû Jaafar II declared in answer to an enquiry by Abû Ali ibn Sulaiman that when land has been dedicated for the poor descendants of so-and-so, it should be applied to the benefit of such of them as are living in the city where the *wakf* is situated, or such as come forward to claim it, and the *mutwalli* is not bound to go in search of them.

(1) *Jawahir-ul-Kalam* chap. on *Wakf*.

Neither a *sadakah* nor a *wakf* can be revoked.

A *sadakah* cannot be revoked after possession has once been given, for it is equivalent to a *hiba-bi'l-ewaz*. The object of a *wakf*, as well as of a *sadakah*, is to obtain the favour of God and when it is made the favour is obtained, so it cannot be revoked.

CHAPTER XVII.

THE MALIKI LAW RELATING TO WAKFS.

SECTION I.

THE CONSTITUTION OF A WAKF.

THE Mâliki rules relating to *wakfs* are in the main identical with the Hanafî Law, except in certain features which require special consideration. The Mâlikis also trace the law of *wakf* to the same tradition as the Hanafîs.(1)

The capacity for making a *wakf* is the same as in respect of other dispositions of property, such as a gift. The *wâkif's* capacity.

The *wâkif* consequently must be :—

(*a*) Free and not a slave.

(*b*) Sane.

(*c*) In good health, or, to be more exact, he must not be suffering from a death-illness. A *wakf* by a "sick" person is similar to a legacy. It is null when made in favour of an heir, and reducible to a third if made in favour of a person who has not the right of inheritance.

"A *wakf* made in favour of heirs," says Khalîl ibn Ishâk, "by a person during the illness of which he dies, is null and void ; but a *wakf* made in favour of descendants of the direct line [who are not heirs] by such a person is valid if it does not exceed the third of the inheritance."

(*d*) Possessor of the property made *wakf*, that is to say, he must have dominion over it.

The Courts of Justice have consequently annulled the *wakf*— (*i*) when the donor died heavily involved in debt, and the property endowed had to be sold to discharge his debts ; (*ii*) when the debts of the settlor exceeded his assets ; (*iii*) when the grantor was not in proprietary possession of the property when he made the *wakf*.

(1) 2 Sautayra, p. 374.

(*e*) *Sui juris*, having the full exercise of his or her rights. A (Mâliki) married woman, therefore, cannot make a *wakf* of more than one-third of her property without the consent of her husband.

A non-Moslem who fulfils the conditions above-mentioned can make a *wakf* of the whole or part of his property. The law imposes but one limitation over the liberality of those who do not follow the Islâmic faith; it forbids their constituting a mosque as beneficiary of their *wakf*. "It is unlawful for a non-Moslem," says the text, "to make a *wakf* in favour of a mosque."

The beneficiary.

A *wakf* can be constituted in favour of every person who can possess property; it can also be made in favour of unborn children and non-existing objects. Accordingly, the *wâkif* can designate as beneficiaries:—

(*a*) A Mussulman, or a non-Moslem fellow-subject (*Zimmi*). But "a *wakf* in favour of a non-Moslem living in a hostile country is invalid."

(*b*) Men and women.

(*c*) Majors and minors.

(*d*) Heirs or non-heirs.

(*e*) Strangers.

(*f*) Works of beneficence and charity, for example, a cemetery, a caravanserai, the tomb of a saint, the sacred cities of Mecca and Medina.(1)

(*g*) The poor, the sick, the maimed, etc.

The *wakif's* powers.

The *wâkif* has, therefore, the right to point out the beneficiaries, to take them either from his family or from without. But is the right absolute? Does it go so far as to enable the *wâkif* to exclude his daughters? The words of Khalîl ibn Ishâk on this point are precise—"a *wakf* in favour of sons to the exclusion of daughters is illegal," and this rule has constantly been enforced by the Courts of Justice in Algeria. "Whereas," says a decree made on the 30th December 1864 by the Court of Algiers, "the Koran is the foundation of the religious dogmas and of the civil law of the Mussulmans; and whereas its precepts determine specially the order and manner of succession in families.

A *wakf* excluding any child from its benefit not valid.

(1) Comp. the provisions of the Hanafi Law, *ante*.

(Sura IX); and whereas the distribution of property such as it has ordained gives to the children of the female sex a quotient of the inheritance of which the female line cannot be deprived in favour of the male descendants without the wish of the Legislator being ignored, consequently a *wakf* so constituted would be tainted by radical illegality as made in disregard of the commandments of the Prophet, the *wakf* in question must therefore be annulled."

"Considering," says another decree of the 3rd November 1868, "that the *wakf* was made according to the Mâliki school; that according to this school female children cannot be excluded from the benefits of a *wakf*, the deed is null and void."(1) "As for sons," according to Sîdi Khalîl, "the grantor may validly exclude them from the *wakf*." "The reverse" (the exclusion of sons), says Perron, "is legal, but the Courts do not feel justified in acting upon the authorities upon whose opinion this view is based, and have extended the principle laid down by Sîdi Khalîl so as to place the sons on the same footing as daughters, and have declared that neither should be excluded from receiving the benefits of the *wakf*." One of the decrees of the Algerian Court of the 20th March 1865, says:—"That in virtue of a verse in Chap. IV of the Koran, the son has the right to a determinate share in the paternal heritage and cannot be excluded therefrom directly or indirectly, that a *wakf* made by the father in favour of his daughter excluding the son should be regarded as being in reality but a disguised donation having for its object the contradiction of the Mussulman Law, that for these reasons such *wakf* must be set aside."(2)

In any case, exclusion is only forbidden as regards children of the first degree. Sîdi Khalîl pronounces only those *wakfs* illegal that are made in favour of sons to the exclusion of daughters. Consequently the Courts have sanctioned the exclusion of—

Descendants of the second degree may be excluded.

(*a*) A grandson.

(*b*) The female issue of daughters.

(*c*) All the issue of daughters.

(*d*) The daughters of sons.

(1) According to the Hanafî Law, it is sinful but not illegal.

(2) These decisions are founded exclusively on the Mâliki doctrines and have no application to the Hanafîs. It will be noticed, however, that the validity of a *wakf* in favour of the descendants is not questioned.

The *wâkif* may designate not only the first beneficiaries of the *wakf* but also the successive ones in the order in which each should come. He, therefore, has the power of laying down special rules of devolution different from that appointed in the *Shar'aa* (the Law).

Rules relating to the devolution of a family *wakf*.

The *wâkif* may declare 1*stly*, that the right of representation should be admitted; 2*ndly*, that devolution should take place *per capita*; 3*rdly*, that the division should be made among the beneficiaries according to sex. But if the deed constituting the *wakf* contains no clause on these different points the following rules will be observed:—

In the absence of an express provision regarding the right of representation the ordinary rule of Mussulman Law would apply. In this respect the Mâliki rules are identical with those recognised by the Hanafîs.

Regarding the second point, devolution in the first degree, that is, among children of the *wâkif*, must necessarily go *per capita*. On the other hand, in the second degree and lower down ordinarily it takes place *per stirpes*, according to the rule laid down by the jurist Ibn Rushd and carried out by al-Lakhim, al-Hattab and others. The son inherits from his father and is not excluded by his uncles, because every child succeeds and continues the branch of his father. The *wâkif*, however, can prescribe that the devolution throughout successive devolutions should be *per capita*.

The Algerian Courts have repeatedly given effect to the ordinary rule. One of the decrees, that of the 20th April 1874, was pronounced under the following circumstances:—a *wakf* had, by a series of successive devolutions, come to two brothers Mohammed and al-Hadj Ali. Mohammed died in 1869, leaving seven children, and the Kâzi of Algiers decided, upon the difficulties that arose about the possession of the *wakf* property, by a judgment of the 20th October 1873 (confirmed on the 20th April following), that the children of Mohammed should divide among themselves as representing one branch the half of their father's share, and that al-Hadj Ali as the head of another branch should hold the other half of the *wakf*.

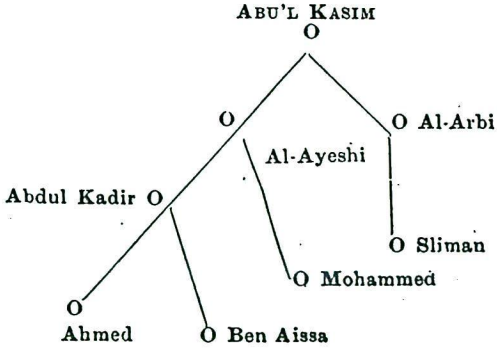
The third point relating to distribution among the beneficiaries is expounded in clear terms by Khalîl ibn Ishâk, "if the

wâkif has not fixed the proportions, men and women should have equal shares."

The *wâkif* can provide further that the preferential right of a double line should be maintained, but in default of an express clause the consanguine should share equally with the relations of the full-blood. "The full brother and consanguine brother," says the Shaikh al-Hattab, "have equal rights, as their relation in respect to the father is equal in degree and in legal force." "If the *wâkif*," says Sîdi Khalîl, "has conditioned that the portion devolving upon such an one should fall to his nearest relative, and if this person has full brothers as well as consanguine and uterine brothers, which of these would have the right to the benefit of the *wakf*; would the full brothers be preferred to the other brothers? No; because they are all equally distant; there are the same number of degrees between them all." The commentator Abdúl Bâki lays down the same doctrine. "By the words 'the nearest relative,' it is understood that the full brother and the consanguine brother have equal rights, as their relationship to their father is equal." **Rules of devolution.**

The lower line in the same branch, which is a degree further off, participates with the upper line, which is nearer, where it is provided by the terms of the *wakf*; if not, it is excluded by the upper line.

In order better to understand this rule we subjoin the following genealogical table—



Abu'l Kâsim, the founder of the *wakf*, had two sons al-Arbi and al-Ayeshi who became entitled in equal moieties to the produce thereof. Upon al-Arbi's death, the profits of the *wakf* were divided into two shares, *viz.*, al-Ayeshi retained his half, and

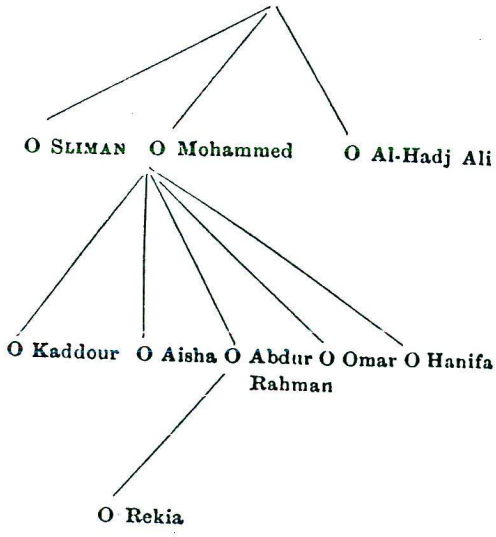
Sliman succeeded to the half of his father's share. Al-Ayeshi had two sons, Abdul Kadir and Mohammed. Abdul Kadir died in the lifetime of his father, leaving him surviving Ahmed and Aissa.

Q. Who should take the half of the *wakf* which had devolved upon al-Ayeshi ?

Rules of devolution —contd.

A. If the *wakfnâmah* does not contain any special condition, Mohammed would take exclusively, because Ahmed and Ben Aissa his nephews, are a degree more distant than he, and because they do not represent their pre-deceased father. Had the *wâkif* made a provision to the effect that all the degree should take equally, the inferior together with the superior, Ahmed, Ben Aissa and Mohammed would have become jointly entitled to the share of al-Ayeshi and would have each taken one-sixth share of the produce of the *wakf*. This is in accordance with a decision of the Court of Algiers passed on the 25th May 1874.

Take another case :



Sliman makes a *wakf* in favour of all his children without distinction of sex ; in default of descendants, in favour of his brothers, Mohammed and al-Hadj Ali, and their issue, similarly, without distinction of sex. Sliman died without issue, and the *wakf* consequently devolved on his two brothers. Mohammed died leaving five children ; they divided equally among themselves the half of that which their father had held. Abdur Rahman then

died, leaving his only daughter Rekia, who takes the whole of her father's share contrary to that which happens upon ordinary succession. Then al-Hadj Ali dies without issue.

Q. Upon whom would devolve *his* half of the *wakf* produce ?

A. Kaddour, Aisha, Omar and Hanifa each take one-quarter. As for Rekia, she is not entitled to a share in Ali's portion, as she is a degree more remote from him than her uncles and aunts, and representation not being provided for, she cannot claim the rights of her father predeceased. This is the solution given by the Court of Algiers on the 20th April 1874.

Where one of the beneficiaries dies without issue, his share devolves, as in the last example, upon his nearest relatives. Sometimes the *wâkif* declares this formally. "The one of the two who dies first shall transmit his share to the other."

But more often the deed is silent on this point, and the Courts interpret this silence as though the clause above quoted were inserted. Thus a man named Ahmed bin Abdul-Kâdir made a *wakf* in favour of his children ; one of these dying without issue, his portion was allotted to his four brothers and sisters, each taking a fourth share in accordance with the decision of the *Majlis* of Médéa of the 3rd September 1858. Thus, again, a *wakf* was held by several beneficiaries ; one of these dying, a contest arose among the survivors, and the Court of Algiers, by a decree of the 12th September 1867, decided that his share should be divided into equal portions among those who were of the same degree of relationship with him. This decision has since been confirmed by a judgment of the Kâzi of the 15th Circle on the 10th September and by a decree of the Court of the 25th July 1871. Such a solution admits of no difficulty when the beneficiaries are all descended in a direct or a collateral line from the founder of the *wakf*, because they are all united by ties of relationship, and are all heirs of one another ; but what should be the principle for decision in those cases where the beneficiaries nominated by the *wâkif* do not belong to the same family and one of them dies without issue ? Would his share fall to his co-beneficiaries ? If the deed contains a clause like the one we have quoted in the *wakfnâmah* of 1874 or any other stipulation from which one might surmise that it was the *wâkif's* wish to leave the *wakf* to the survivor, the question would be answered in the affirmative ;

this is clearly deducible from the principle laid down by Khalîl ibn Ishâk :—"A *wakf* granted to ten people for enjoyment during their lives reverts, after all are deceased, to the *wâkif* or in his default to his heirs."

In the absence, however, of any condition to that effect in the *wakfnâmah*, the co-beneficiary has no claim, and the deceased's share would go to the succeeding beneficiary, or would revert to the donor if the succession is not indicated, as exemplified in the following passage in the text :—"When a *wakf* is made in favour of two particular persons, and after them in favour of the poor, these would be placed after the decease of one of the two in possession of his share."

Section II.

What may be constituted Wakf.

The subject of *wakf*.

Khalîl ibn Ishâk has laid down, that all property over which dominion can be lawfully exercised may legitimately be constituted *wakf*. And the jurists have gone so far as to declare that benefit accruing from draught-cattle or horses, and the services of slaves to nurse the sick, may lawfully be dedicated. Whether simple aliment can be made *wakf* depends on the answer to the general question whether movable property can be lawfully dedicated. And it must be admitted that there is considerable divergence among the jurists on this point. But it seems generally agreed that movable property can be made *wakf* as well as immovable property, and Perron has declared that this is in accordance with the spirit of the Mâliki school. A decree of the Court of Algiers has confirmed the above principle. Khalîl ibn Ishâk has declared that the *wakf* of a book for a library or a war-horse or a suit of armour is lawful. But in consideration of the primary object of a *wakf* and of the fact that when an appropriation is made, the intention of the *wâkif* is to reserve property for pious acts, the usufruct being only given to the beneficiaries, the lawyers have held that those things which are liable to be destroyed by use or likely to perish in the course of time, could not be constituted *wakf*.

***Wakf* of movable property valid.**

But a *wakf* may be made of every kind of movable object, when they are to be sold and the price realised therefrom is to

be invested in the acquisition of immovable property or other property from which permanent benefit is accruable.(1) Agricultural implements, oxen and other animals for agricultural purposes may be made *wakf* without any question.

Wakf of *mushâ'a* valid.

A fractional share of a particular property may lawfully be dedicated. And when a house has been made *wakf*, and a portion of it has been sold to pay the *wâkif's* debts, the remaining portion will continue subject to the dedication. It is not necessary that the *wâkif* should be in actual possession of the property at the time of making the *wakf*. The law authorises the dedication of future property This principle has been confirmed by a decree of the Kâzi of Algiers made in 1873 and again in 1874. The latter is worded thus.: 'A dedication in the name of the Almighty constituting as *wakf* the whole of which a man is possessed, and that which may accrue to him in the future, is lawful, but it will take effect with reference to such properties of which the beneficiary obtained full possession before the death of the *wâkif*.''

Formalities relative to the creating of a *wakf*.

"A *wakf* is made," says Sîdi Khalîl, "by the use of the following expressions: 'I make a *wakf*,' or 'I give in alms;' but these formulæ must be emphasised by indicating the object of the dedication."

In spite of its importance the constitution of a *wakf* is not subject to any solemnity or publicity. It is validly made by a declaration before witnesses. But the validity of a *wakf* is subject to some essential conditions, namely, (*a*) that it should bear the character of a pious act; (*b*) that there should be a transfer of the subject-matter of the *wakf*, and (*c*) that the proprietary rights of the *wâkif* should be divested therefrom. The first of these conditions is the result of the constitution of a *wakf* generally. Consequently, when a *wakf* is made in favour of private individuals, the ultimate dedication is always reserved for such objects as the Holy Cities, a mosque, a caravanserai, a cemetery, a sanctuary, the poor, etc. This is done by adding a clause generally worded thus: —"And after the total extinction of the appointed beneficiaries the *wakf* should go to so-and-so." We may add that a pious act may be independent of the idea of *charity*. Sîdi Khalîl expressly mentions this and Perron explains that the *wakf* would be valid

The validity of a *wakf* not dependent upon a charitable purpose.

(1) Comp. the Hanafî Law.

and the act pious, even though the beneficiaries were in the most affluent circumstances.

Delivery of possession necessary.

On the necessity of delivery of possession to a trustee on behalf of the beneficiaries or a change of seisin, the Mâlikis differ from Abû Yusuf but agree with Imâm Mohammed and the Shiahs. "The taking of possession," says Mohammed Assem, "is the soul of a *wakf*, and if the *wâkif* continues to overlook and administer the *wakf* property *and to exercise rights of ownership over it*, this in itself renders the *wakf* null; the law cannot legalise it." What is required, however, is not actual delivery of possession but transmutation of possession, or a change in the character of the dominion exercised over the property dedicated. The *wâkif* may lawfully constitute himself the trustee.

When a *wakf* is in favour of an individual, possession of the beneficiary should be either by himself, if adult, or by his father or guardian, if an infant; when it is in favour of a body of individuals, transfer of possession must be made to a trustee.

In the case of a *wakf* for a pious or religious purpose, possession should be taken by its administrator. Transfer of possession is dispensed with only in case of a *wakf* made by a father in favour of his minor son, provided the circumstances sufficiently show that there was a *bonâ fide* intention to make a *wakf*, *e.g.*, (*a*) that the produce of the *wakf* had been applied to the benefit of the *cestui que trust*; (*b*) that the father did not himself continue to derive absolute benefit therefrom.

When possession should be taken.

The taking of possession is therefore a necessary formality, but at what period should it take place? "The law does not dictate that this formality should immediately follow the deed of constitution; it only requires it to be accomplished while the constituent still retains the necessary qualifications for establishing a *wakf*; that is, possesses the disposing capacity and is able to exercise the right of property over it." "The *wakf* is null," says Khalîl Ibn Ishâk, "when it has not been taken possession of before the death of the grantor, or before the illness to which he succumbed."

The *wâkif* has the power of subjecting the *wakf* to certain conditions, and these conditions must be strictly observed. He may determine the school of law according to which it should be managed, appoint the person or persons to undertake the administration, settle the order of successive devolutions, declare

that the beneficiary in case of poverty should have the right to alienate the *wakf*, prescribe that in certain cases the *wakf* should revert to his heirs, and so forth; and, in general, order all measures relating to the execution of the *wakf*; but *there* his power ends, and any conditions contrary to the principle of *wakf* or reserving a power to alter its provisions or to annul the *wakf* or to sell the property, in fact, any condition which would have the effect of destroying the *wakf*, is null and void.

Temporary *wakf* lawful.

According to Khalîl Ibn Ishâk, perpetuity is not an essential condition of *wakf*; and his two commentators, al-Karkhi and Abdul Bâki, explain further that temporary *wakfs*, those made for even a single year or for the lifetime of any given person, are lawful and valid, and that the produce of the *wakf* thus constituted where no beneficiary is indicated, after the expiration of the period for which the trust is created, will go to the poor.

Can the *wâkif* annul the *wakf* of his own motion solely? Can he modify the prescribed clauses before possession of the beneficiary? The jurists, among them Ibn-ul-Hâjib and Abdus-Salâm, have answered these questions in the negative. The constitution, once made, must remain intact and be carried into effect without any modification. And if the clauses of the *wakfnâmah* are obscure, incomplete, or susceptible of diverse interpretation, the difficulty should be taken before the Kâzi, who must pronounce according to the custom and usage of the place or according to the mode in which it has hitherto been carried into effect, if it has existed for some time.

Section III.

The Legal Effect of a Wakf.

The legal effect of *wakf*.

The constitution of a property into *wakf* produces three different effects: It renders the property constituted as *wakf* inalienable, imprescriptible and non-heritable. A *wakf* property is inalienable, *because it belongs virtually to Almighty God, being intended for the benefit of mankind, the successive beneficiaries being entitled only to the usufruct thereof and not having the power to alienate it.*

There are, however, several exceptions to this principle. If the *wakf* be of land or of movable property that can no longer be useful, it should be sold and others bought with the price thereof.

If a mosque has to be enlarged, and if the sale of a piece of land attached thereto is the only mode by which funds can be forthcoming therefor, such sale would be permitted. If a beneficiary be poor and the produce of the *wakf* insufficient to procure for him the means of subsistence, alienation might take place with the leave of the Kâzi, whether the *wâkif* provided for this in the deed or not.

If the *wâkif* was so heavily indebted at the time of creating the *wakf* that his debts exceeded his assets, the creditors would be entitled to realise the debt from the property, and after their debts have been satisfied, the balance of the sale-proceeds, if any, should be invested for the benefit of the *cestui que trust*. A *wakf* may be the object of an exchange, but such exchange would only be valid upon approval of the Kâzi, after he has assured himself that the value of the two properties is equal. The exchanged property would then become *wakf* and would be subject to the same rule as the original *wakf*, and if the *wakf* had been for a specific purpose which fails, it would be applied to some other pious object, if possible similar in character to the original purpose; for example, a *wâkif* dedicates some property for the purpose of constructing a bridge or a school, and if those buildings have been constructed by the State, the produce of the property would be applied to some similar object, in default of which the *wakf* would be applied to help the poor kindred of the *wâkif*, preferentially his *asabâh* (agnates).

The beneficiaries have no right to alienate the *wakf* property; they can only enjoy its produce. For that purpose they are entitled to hold possession of it either personally or by a manager or administrator.

Neither the *cestui que trust* nor the administrator can grant a lease of the *wakf* property for a long period. According to Sîdi Khalîl, two years, according to others three years, is the longest term for which a lease may be given unless it is given to the next beneficiary, when it may be for ten years. The lease may, however, be extended if the property needs repairs. It is a principle that property held as *wakf* must be kept in good repair, and that future beneficiaries can, in order to preserve their rights, oblige the usufructor to lease the house that is falling into ruin and to apply the rent wholly to its reconstruction or repair.

(*b*) The second effect of the constitution of *wakf* is to render the property imprescriptible, that is, it cannot be subject to the rights of the sovereign as private property.

(*c*) The third effect resulting from the constitution of *wakf* is, that it renders the property so dedicated non-heritable, and subjects the course of descent, in respect of the beneficial interest, to the succession pointed out by the *wâkif*. On this point all writers agree. "The rules of succession to *wakf* property laid down by the *wâkif* must be strictly observed," says Sîdi Khalîl, and Ibrâhim Halabi(1) adds, that "the *wâkif* has absolute power to make any disposition he wishes regarding the usufruct of this property."

The directions of the *wâkif* must be carried out.

(1) The author of the *Multeka*.

CHAPTER XVIII.

THE LAW OF WAKF ACCORDING TO THE SHÂFEÏ SCHOOL.(1)

It is essential that the *wâkif* should be capable of declaring his will, and that he should have the faculty of disposition over his property, while the subject of the *wakf* must be such as can be made use of perpetually. Therefore, the subject of the dedication may not consist of aliments or odoriferous plants; but with that exception, the *wakf* of movable property is as valid as that of immovable property. But it is not valid to make a *wakf* of a trained dog. The *wakf* of *mushâ'a* or property held in joint tenancy is valid. The validity of a *wakf* of buildings or plantations upon another person's land held by the owner of the buildings or plantations under a lease is acknowledged.

The object in whose favour a *wakf* is created must be capable of taking possession constructively or actually of the *wakf* property. A *wakf*, therefore, in favour of an infant *en ventre sa mère* or a slave is not valid.

A *wakf* may be made in favour of a *Zimmi* (a non-Moslem fellow-subject), but not in favour of an apostate, nor of a non-Moslem not subject to a Mussulman ruler nor *in favour of one's self*.(2) A *wakf* for an unlawful purpose, as for example, the construction of Christian churches or of synagogues is void; but a *wakf* in favour of an hospital for Christians or Jews, made as it is with a pious motive, is lawful. A *wakf* is valid equally in favour of the poor as of the rich, of the learned, of mosques or of schools.

The intention of making a *wakf* must be formulated in explicit terms, "I make a *wakf* of such a thing," or "my field shall be a *wakf* in favour of such a person." The expressions "I consecrate," or "I offer it to such charity," are also explicit.

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(1) The following is from the *Minhâj-ut-Tâlibîn*.

(2) Comp. the Hanafî and Shiah Law.

The same is the case with the expression, "I make a sacred gift of such a thing," or "endow it," or "it shall not be sold or given to another person." On the other hand, the expression "I give" without any further qualification cannot be considered explicit, even if the intention was to make a *wakf*; and it is only in the case of a *wakf*, not in favour of one or more individuals, but in favour of a class of people or of the public, that this expression accompanied by the intention is regarded as explicit. The expressions, "I consecrate such an object," or "I wish that it should remain eternally in that state," are not explicit; but the words "I destine such a property for the purpose of a mosque" suffice to make the spot consecrated to worship. Expressions by which a *wakf* may be constituted.

A *wakf* in favour of a certain and particular person is not complete without his acceptance, which acceptance must in no case take place after a previous refusal. A *wakf* made in these terms, "I constitute this my land *wakf* for the term of a year" is void, but if the words used are, "I make a *wakf* in favour of my children, or in favour of such an one and subsequently upon his issue," without adding anything else, the *wakf* remains intact even after the extinction of the family. *The usufruct of the wakf reverts to the nearest relative of the founder when the purpose fails* and the *holders nominated by him have become extinct.* Failure of the object of a *wakf*.

According to the Shâfeï doctrines in every *wakf* a beginning must be made with an object in actual existence; for example, when a *wakf* is made in the following terms, "I make a *wakf* in favour of the child I may have;" it is invalid, for there is nobody to take possession of the *wakf*; but the failure of any of the *intermediate* beneficiaries does not avoid the *wakf*.(1)

Nor can a *wakf* be made dependent upon a contingency which may never occur; as for example, "I make a *wakf* on condition that Zaid should come." A contingent *wakf*.

Conditions imposed by the *wâkif* must be observed faithfully, as for example, if he has made a condition that the endowed lands shall not be let out, it can only be done with the sanction of the Kâzi; or that a religious building founded be specially dedicated

(1) The Shâfeïs are in agreement with the Shiahs on this point. Under the Hanafi Law, as already observed, if a *wakf* is created for a non-existent object the *wakf* will not be invalid; its income will be applied for the benefit of the poor until the object specified comes into existence.

to a certain persuasion, such as the Shâfeï. In this latter case, the members of this sect alone shall be entitled to share in the benefit of the *wakf*. And this rule applies equally to the founding of a school or of a hostelry. In the case of an endowment in favour of two persons and subsequently in favour of the poor, at the death of one of them his portion of the usufruct reverts to the other and not to the poor,(1) who only profit thereby after the death of both. This doctrine has been supported by Shâfeï himself.

Wakf in favour of children and descendants.

When a *wakf* is constituted in the following terms, *viz.*, "the *wakf* is for my children and my grandchildren," the usufruct must be equally divided among the children and the grandchildren that exist at the time of the *wakf*, even if the words "who are their descendants" or "generation after generation" is added.

When, on the other hand, the following terms have been used "in favour of my children, then of my grandchildren, then of my great-grandchildren, the one after the other," or "the former first," the successive generations have the enjoyment of the usufruct but the first class takes first. The grandchildren, however, have no right to a *wakf* made only in favour of children. The grandchildren born of the daughter of the founder are included in the expressions "posterity," "descent," "progeny," or "grandchildren" unless it has been declared, "the grandchildren that bear my name."

An apposition preceding several words joined together refers to all, as for example in this sentence, "I make a *wakf* in favour of those who are dear to me, my children, my grandchildren and my brothers," it is the children, grandchildren and brothers that are accounted "dear" by the founder. The same is the case with an apposition that follows and of the reservation added to the principal clauses, provided that these words are united by the conjunction "and." For example, "I make an endowment in favour of my children and of my grandchildren and of my brothers who are dear to me" or "provided there are no persons of notoriously bad conduct among them."

The proprietorship of *wakf* property is transferred to God, that is to say, such property ceases for ever to be subject to the

(1) Comp. the Hanafi Law, *ante*, p. 384.

right of private proprietorship and thenceforth it belongs neither to the *wâkif* nor to him in whose favour the *wakf* is made. Only the usufruct of the *wakf* belongs to the beneficiary and he may have the enjoyment thereof either in person or by the intermediation of another, for example, by lending him the endowed object or letting it to him. The holder of the usufruct has the full right to the rent or to that which the endowed property produces, such as fruit, wool and milk, and the young of the animals. After the death of a *wakf* animal, the skin belongs to the holder of the usufruct.

Wakf property not subject to rights of private proprietorship.

The *wakf* of a tree does not, according to the Shâfeï school, become extinct when the tree dies, as the decay of a tree does not preclude the use of the wood, though, according to others, the tree must then be sold by auction and the price used in the same manner as the indemnity for a murdered bondsman which must be applied in obtaining the services of another. The worn-out mats and the broken beams of a mosque may be sold, and this is only lawful on condition that these articles should serve as fuel. The ground on which a mosque stands may, in no case, be sold even if the edifice has fallen into ruin and its reconstruction be impossible.

The rules relating to *towliat*.

When the founder has reserved for himself the administration of the *wakf*, or if he has conferred the office upon a third person, the arrangement must be carried into effect; but if nothing of this kind has been stipulated by the *wâkif*, the administration devolves on the Judge who has the power of appointing a manager. It is essential that the administrator of a *wakf* should be of good character and qualified for the office both by his physical powers and intellectual faculties. The functions of the administrator are the custody and consolidation of the *wakf* property and the collecting and distributing of the rents and profits, but he is forbidden to over-step the limits of his powers, if the administration has only partly been given to him. In every case, the founder has the right of deposing his administrator and of appointing another, unless he be nominated administrator in the deed of endowment itself without reservation of such a right. A lease granted by an administrator continues notwithstanding a rise in price or a more advantageous offer.

CHAPTER XIX.

Rules of Procedure.

As regards the right of a beneficiary to obtain a declaration that a certain property is *wakf*, or to establish his title to a share in the proceeds of a certain *wakf*, the Mussulman Law is very distinct. It provides that any beneficiary can at any time proceed before the Kâzi and obtain any redress to which he may be legally entitled. The law imposes no restriction as to the manner in which he should proceed. The Indian Legislature, however, has, with respect to a certain class of cases, provided rules which require consideration, especially as the Calcutta and Allahabad High Courts are not in accord with each other in regard to the procedure.

In Mussulman countries, endowments which are in their nature public, or the benefits of which are for the public generally, are under the direction, control and supervision of a special officer appointed by the Government, who is called the *Nâzir-i-Awkâf*. But the Kâzi, as the representative of the sovereign, is the general curator of all *wakfs*, whether public or private. When the British first assumed under the authority of the Mogul Emperor the government of these Provinces, they found scattered throughout the country numerous endowments, chiefly created by the sovereigns and chieftains. For a time matters were allowed to remain in the condition of disorder in which the collapse of the Mussulman Government had left the endowments. But in 1810 it was found necessary to pass a law for the purpose of protecting and preserving these dedications and grants. With that object Regulation XIX of 1810 was passed. Its object is sufficiently clear from the preamble.(1)

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(1) "Whereas considerable endowments have been granted in land by the preceding Governments of this country, and by individuals for the support of mosques, Hindoo temples, colleges and for other pious and beneficial purposes, and whereas there are grounds to suppose that the produce of such lands is in many instances appropriated contrary to the intentions of the donors to the per-

In 1863, however, it was considered desirable on the part of Government to divest itself of all connection with the religious endowments of Hindus and Mahommedans, and to retain the control only of such institutions as were secular in their character. It was supposed that the connection of a Christian Government with the religious establishments of Hindus and Mahommedans was anomalous and inexpedient. To give effect to this mistaken, but intelligible, policy, Act XX of 1863 was passed.(1)

The preamble and the earlier sections of this Act indicate conclusively its scope, and there can hardly be any doubt that its operation was confined to such trusts or endowments as were transferred to trustees under sections 4 to 7 of the Act. And so

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sonal use of the individuals in immediate charge and possession of such endowments, and whereas it is an important duty of every Government to provide that all such endowments be applied according to the real intent and will of the grantor, and whereas it is moreover essential to provide for the maintenance and repair of bridges, serais, kuttaras and other buildings which have been erected, either at the expense of Government or of individuals for the use and convenience of the public, and also to establish proper rules for the custody and disposal of *nuzool* property or escheats, the following rules have been enacted to be in force from the period of their promulgation throughout the provinces immediately dependant on the Presidency of Fort William.

"The general superintendence of all lands granted for the support of mosques, Hindu temples, colleges and for other pious and beneficial purposes, and of all public buildings, such as bridges, serais, kuttaras and other edifices, is hereby vested in the Board of Revenue and Board of Commissioners in the several districts, subject to the control of those Boards respectively."

(1) "Whereas it is expedient to relieve the Boards of Revenue and the Local Agents in the Presidency of Fort William in Bengal and the Presidency of Fort St. George from the duties imposed on them by Regulation XIX of 1810 of the Bengal Code, so far as those duties embrace the superintendence of lands granted for the support of mosques or Hindu temples and for other religious uses, the appropriation of endowments made for the maintenance of such religious establishments, the repair and preservation of buildings connected therewith, and the appointment of Trustees or Managers thereof, or involve any connexion with the management of such religious establishments, and whereas it is expedient for that purpose to repeal so much of Regulation XIX, 1810, of the Bengal Code, and Regulation VII, 1817, of the Madras Code, as relate to endowments for the support of mosques, Hindu temples or other religious purposes, it is enacted as follows :—

1. "So much of Regulation XIX, 1810, of the Bengal Code, and so much of Regulation VII, 1817, of the Madras Code, as relate to endowments for the support of mosques, Hindu temples or other religious purposes are repealed."

Section IV furnishes the chief index to the object of the Act.

"In the case of every such mosque, temple or other religious establishment which at the time of the passing of this Act shall be, under the management

Delroos Banoo Begum v. *Nawab Syed Asghur Ally Khan.*

it was expressly decided in the case of *Delroos Banoo Begum* v. *Nawab Syed Asghur Ally Khan*,(1) in which it was further held that where such transfer had taken place, parties interested in such endowments might come in and apply for leave to sue the trustee or manager thereof,(2) and no suit would be maintainable without leave previously obtained under section 18. But where the charge of the endowments had never been transferred to trustees under the provisions of the Act, no preliminary leave was necessary. In fact, the transfer under sections 4 to 7 was regarded as a test whether the endowment was, in its nature, public or not. If it had been taken charge of by the Board of Revenue under Regulation XIX of 1810, and subsequently transferred to trustees under Act XX of 1863, *primâ facie*, it was such as to entitle the public generally to share in its benefit. And in that case preliminary leave to sue would be necessary before a suit could be maintained. The principle laid down in *Delroos Banoo Begum* v. *Nawab Syed Asghur Ally* with reference to the nature and scope of Act XX of 1863 has been virtually overruled by the decision in *Jan Ally* v. *Ram Nauth Mundul.*(3) In this case, it has been held in effect that every mosque, Hindu temple, college or religious institution for the support of which land had been granted by the preceding Governments, or by individuals, come within the purview of the Act, and that consequently no suit can be instituted with reference to any of these institutions without leave having been

Jan Ally v. *Ram Nauth Mundul.*

Latifunnissa v. *Nazirun Bibi.*

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of any Trustee, Manager or Superintendent whose nomination shall not vest in nor be exercised by nor be subject to the confirmation of the Government nor any public officer, the Local Government shall, as soon as possible after the Act, transfer to such Trustee, Manager or Superintendent all the landed or other property which at the time of the passing of this Act shall be under the superintendence or in the possession of the Board of Revenue or any Local Agent and belonging to such mosque, temple or other religious establishment except such property as is hereinafter provided and the powers and responsibilities of the Board of Revenue and the Local Agents in respect to such mosque, temple or other religious establishment and to all land and other property so transferred except as regards acts done and liabilities incurred by the said Board of Revenue or any Local Agent previous to such transfer, shall cease and determine." Section V provides the procedure in cases of dispute regarding the right of succession in case of a vacancy in the office of trustee, &c., to whom property has been transferred under Section IV, and Section VI declares the rights, powers and responsibilities of such trustees.

(1) [1883], 15 Beng. L. R., 167.

(2) See *Kaniz Fatima* v. *Bibi Sahebjan*, 8 W. R., 313.

(3) [1882], I. L., 8 Cal., 32.

first obtained under section 18.(1) This ruling apparently was adopted in another case decided by the Calcutta High Court.(2) In this case the plaintiff had sued to recover possession as *mutwalli* of certain parcels of land alleging that they were dedicated as *wakf*, and that the profits were applied to the feeding of wayfarers and travellers, to lighting the mosque and shrine in the evening, and to meet the expenses of repeating prayers on the occasion of *Id* and *Bakreed*, and that the said profits were never spent for personal purposes. The plaintiff also alleged that her deceased husband had been the former *mutwalli*, that upon his death her step-son took possession of the *wakf* properties and had since given a mokurruri pottah of the dedicated lands to the second defendant. She accordingly prayed that the properties in suit may be declared to be *wakf*, and the sale and lease thereof may be set aside.

She succeeded in establishing that the four parcels of the land in suit were *wakf* and obtained a decree in respect thereof in the first Court which was upheld by the Judge. On special appeal to the High Court of Calcutta, it was urged on behalf of the defendants that the plaintiff had no sufficient interest to entitle her to sue. These contentions were accepted by the learned Judges who dismissed the plaintiff's suit on the following grounds :—

"According to the plaint in this case the trust is one partly for charitable and partly for religious purposes. So far as the trust was 'for the feeding of wayfarers,' it was a trust for the benefit of a considerable portion of the public answering a particular description, and was therefore a trust for a public charitable purpose. The object of the plaintiff's suit was to oust the *mutwalli*, get herself appointed in his place and have the properties vested in her. Section 539 of the Code applies to a suit of this nature which is really one for the administration of the trust, and such a suit can only be brought in accordance with the provisions of that section. But even supposing that the endowment in the case was neither a public charity within the meaning of sec-

(1) Section 18 runs thus :—"No suit shall be entertained under this Act without a preliminary application being first made to the Court for leave to institute such suit. The application may be made upon unstamped paper. The Court on the perusal of the application shall determine whether there are sufficient *primâ facie* grounds for the institution of a suit, and if in the judgment of the Court there are such grounds, leave shall be given for its institution, &c."

(2) *Latifunnissa Bibi* v. *Nazirun Bibi* [1885], I. L., 11 Cal., 33.

tion 539 of the Civil Procedure Code, nor a religious endowment to which Act XX of 1863 is applicable, the plaintiff was not entitled to sue alone to be appointed *mutwalli* and to obtain possession of the property. The first Court holds that she was entitled to bring this suit, because she was a wife of Mokram Ali, the late *mutwalli*, but we cannot agree that this is a sufficient reason. Even if we regard her as suing as a person interested in the trust, then, on the face of the plaint, there are other persons interested and she could only sue on behalf of all who were so interested, and in order so to sue she should have obtained the permission of the Court and otherwise complied with the provisions of section 30 of the Civil Procedure Code; not having done so, we think she had no right of action. In whatever light the suit be regarded, therefore, we think it clear that it was not properly framed and will not lie."

As will be seen later, this view is clearly opposed to the provisions of the Mahommedan Law, and it introduces restrictions not recognised under that law. The Allahabad High Court has dissented from the views expressed by the Calcutta High Court. It has held that every Mahommedan has an inherent right to maintain a suit for the purpose of establishing a *wakf* or his own right to share in its benefits. In the case of *Zafaryab Ali* v. *Bakhtawar Singh*,(1) certain Mahommedans sued for possession of a "takia" known by the name of Najuf Ali Shah, "by cancellation of an hypothecation thereof, dated the 28th May 1877, and of a decree, dated the 18th May 1880, as well as of a judicial sale, dated the 30th May 1881, by the demolition of two walls and by the ejectment of the defendants." They alleged in their plaint that the property in suit was "*wakf*" or a charitable endowment including a mosque (imâmbara) and a grave-yard in which there were many tombs, * * * * that defendant No. 1, the manager of the property, and the ancestors of defendants Nos. 2, 3 and 4 hypothecated the premises to defendant No. 5 who, having obtained a decree enforcing the hypothecation, caused the property to be brought to sale, and it was purchased by him and defendants Nos. 6 and 7, that defendant No. 5 having obtained possession of the property, erected two walls on

Zafaryab Ali v. *Bakhtawar Singh.*

(1) [1883], I. L., 5 All., 497.

the land thereby interfering with the purposes for which the property was originally intended, and that the plaintiffs became aware of all these proceedings on the 24th January 1882, and in consequence brought the present suit. The defendants set up as a defence to the suit that the plaintiffs were not competent to sue. The Court of First Instance held that the plaintiffs were competent to sue, observing as follows :—

"It is a rule of daily practice that every aggrieved party is entitled to get his grievance remedied. On the same principle a certain set of the interested Mahommedans in this case have come forward to bring this suit against the defendants to get their complaint redressed by the Courts of Justice. The Mahommedan Law sanctions the course of action by the plaintiffs in this case. Every Mahommedan according to the tenets of his religion is entitled to get public charitable property protected from the hands of strangers."

On appeal, however, the Judge reversed the decision of the first Court, holding that the plaintiff had no right to sue. He also made the following observations :—

"Referring to a recent and closely analogous case decided by the Presidency Court in August last, *Jan Ali* v. *Ramnauth Mundul*,(1) I am of opinion that plaintiffs have no right to bring the present suit which is to have the property declared *wakf* and made over to them as such. They do not, however, pretend to be the trustees or to have a special interest in the alleged endowment, nor do they bring forward any deed creating it ; I do not think that this brings the suit under Act XX of 1863, for they do not really mean to sue the manager for misfeasance, although they have included him in the prayer to set aside his conveyance. But even if it did, the suit is out of rule, as there was no application made to this Court or to any other for permission to sue. If it be alleged that there has been a breach of trust regarding a charitable endowment, then the leave of the Collector ought to have been obtained under section 539, which has not been done. The plaintiffs, moreover, have not made any assertion in any part of their plaint as to any special right of suit, as to their being persons attending or having a right to attend the alleged mosque, but simply state their ground of action to have arisen when they heard of the alienation to the defendants. Were this suit brought by the latter, the Courts could deal with it, but a question (such as lies at the root here) of whether a place was one of public worship, &c., would be more appropriately settled by the Municipal Commissioners of the town as it certainly would be more legal to adopt such a course. For this reason I dismiss the suit.

In second appeal, the plaintiffs contended (*a*) that being members of the Mahommedan community, they were legally competent to maintain the suit ; (*b*) that they were not bound to observe the preliminary procedure enjoined by section 539 of the Civil Procedure Code, that section having no bearing on the suit ; and (*c*) that the Lower Appellate Court had misapprehended the scope of the suit which did not seek any of the remedies provided by that section.

(1) *Supra.*

The High Court of Allahabad reversed the second Court's judgment, holding as follows :—

"The plaintiffs as Mahommedans, entitled to frequent the mosque and to use the other religious building connected with the endowment, can clearly maintain the present suit, and section 539 of the Procedure Code has no application to such a case ; the endowment in question being, in our opinion, a religious institution within the meaning of section 24 of Act VI of 1871, and therefore governed by Mahommedan Law. We therefore remand the case under section 562 of the Code of Procedure for trial on the merits."

Jawahra v. *Akbur Hossein.*

In the later case of *Jawahra* v. *Akbur Hossein*,(1) which was decided by a Full Bench of the same Court, the question as to the right of a Mahommedan to maintain a suit for the establishment of his right to use a mosque for purposes of devotion was discussed at considerable length.

The plaint in this case stated that, in a village belonging to the plaintiff, there was an "old dilapidated mosque intended for Mahommedan worship" which "was protected and looked after" by him and other Mahommedans of the village ; that in consequence of the mosque and its appurtenances being *wakf*, it had been excluded from the partition of the village, and the plaintiff intended to repair the mosque ; that the defendants had enclosed a part of the land and had also erected a mill on a part of it ; that they had by means of certain erections of thatch and mud converted the mosque into a place for storing straw, all of which acts they had wrongfully done ; that the plaintiff had remonstrated with the defendants and asked them to remove the things, but they paid no attention to this request, and prevented the plaintiff from making repairs ; and that these "unlawful acts of the defendants were calculated to affect the character of the said endowed property and were an insult to their religion." Upon these allegations the plaintiff claimed "a declaration of his right to repair the old dilapidated mosque.....by removal of the defendants' interference" and the demolition of the compound, by removal of the mill, the thatches and the straw stored in the mosque. The plaint concluded with these words—"Suit brought according to the doctrines of the Mahommedan religion and on written and oral evidence." The defendants did not deny the acts imputed to them by the plaintiff. They defended the suit upon the grounds, amongst others, that the building which was

(1) [1885], I. L., 7 All., 178.

the subject-matter of the suit was not a mosque but an "atta or fortress made for the purpose of shelter from robbers in former days," and that the plaintiff had no right to repair it. The Court of First Instance found that the building was a mosque and not an "atta," and held that "the plaintiff, as a Mahommedan and guardian of religious buildings, was entitled to repair the mosque." It, therefore, gave the plaintiff a decree as claimed. On appeal the defendants contended that "a claim for endowed property cannot be instituted and heard without the permission of the Advocate-General under Act XX of 1863." Upon this point the Court observed as follows :—

"The first ground of appeal must be overruled. In a similar case— *Zafaryab Ali* v. *Bakhtawar Singh*(1)—our own High Court have just ruled that section 539 of the Civil Procedure Code would not apply, and that the plaintiffs, as persons entitled to frequent the mosque, can maintain the suit. This, however, is quite opposed to a ruling of the Calcutta High Court—*Jan Ali* v. *Ram Nauth Mundul.*"(2)

The decree of the Court of First Instance was accordingly affirmed.

On second appeal the defendants contended (*a*) that the suit was not maintainable in its present form, as no special right to sue in the plaintiff was disclosed, and (*b*) that as there were probably other Mahommedan residents in the village, the suit was not maintainable without compliance with the provisions of section 30 of the Civil Procedure Code.

Upon these facts and contentions, Chief Justice Petheram delivered the following judgment :—

"I have no doubt that the plaintiff was competent to maintain this action. The question has arisen in consequence of the peculiar way in which property of this kind is held. According to Mahommedan custom, the property in a mosque and in the land connected with it is vested in no one. It is not the subject of human ownership, but all the members of the Mahommedan community are entitled to use it for purposes of devotion whenever the mosque is open. Now, the Mahommedans are only a part of the population of this country, so that the right is not vested in the general public, and therefore it resembles a right in a private way. Every one who has such a right is entitled to exercise it

(1) [1883], I. L., 5 All., 497.
(2) *Supra.*

Jawahru Akbur Hossein—contd. v. without hindrance, and has a right of action against any one who interferes with its exercise. It is not a joint right, it is a right which belongs to many people. Section 30 was meant to apply to a case in which many persons are jointly interested in obtaining relief; and where under the old law it would have been necessary for all of such persons to be joined, section 30 prevents the record from being unnecessarily encumbered by many names, and allows one or more with the permission of the Court to sue or defend on behalf of all. The rule was introduced in order to prevent rich persons from joining together and putting forward a pauper to conduct the suit and thus escaping all costs. In the present case it is clear that an individual right has been violated, and that an action will therefore lie."

Mr. Justice Mahmud's remarks are also well worthy of consideration :—

"I wish to add a few observations regarding the Mahommedan Law as to endowments generally, and in particular as to mosques. It must, in the first place, be shown that the Mahommedan people have a right to maintain a suit like the present. But authorities on such a point need not be cited, for the principle is too well known among Mahommedan lawyers. The rule of the Mahommedan Law on the subject is that, when any one has resolved to devote his property to religious purposes, as soon as his mind is made up and his intention declared by some specific act, such as delivery, &c., an endowment is immediately constituted; his act deprives him of all ownership in the property, and to use the technical language of Mahommedan lawyers, vests it in God in such a manner as subjects it to the rules of divine property whence the appropriator's right in it is extinguished, and it becomes a property of God by the advantage of it resulting to His creatures."

"A mosque is an endowment of this kind, and the Mahommedan community or any member of it has a right to enter the mosque and to pray there. The learned Chief Justice has shown that, under the circumstances, in India, a mosque cannot be regarded as vested in the public at large, but in the Mahommedan part of the public, and it cannot be said that any Mahommedan is bound to maintain a suit on behalf of the public generally. The right of a Mahommedan to use a mosque is, as the learned Chief

Justice has said, like the right to use a private road ; any one who has the right may maintain a suit in respect of it. This settles the question as to section 30 of the Civil Procedure Code. That section applies only to cases where no individual right is interfered with, but here we have the case of a mosque in a small village, and one of the worshippers in that mosque is obstructed in his use of it for purposes of devotion. He had a private right and it was violated. In regard to section 539 of the Civil Procedure Code, I was one of the Bench who made this reference, and I wish to add my reasons for holding that the section does not apply to the present case. There is here no question of trust or trustee or of malversation of trust-funds or other breach of trust. The object of such a suit as this is not such as is contemplated by any of the various clauses of section 539. In conclusion, I have a few words to say regarding the case which has been cited, *Jan Ali* v. *Ram Nauth Mundul*,(1) decided in the Calcutta High Court by Prinsep and Field, JJ. Towards the end of the judgment in that case the following observations occur : ' Now so far as regards these prayers, we think that the plaintiffs were not authorised to institute this suit merely by reason of having that interest which is set out in para. 10 in the plaint, that is, an interest created by their being followers of the Moslem religion living in the vicinity of the mosque and being in the habit of attending the musjid. That interest is common to them with a large number of other persons—common to them with, we will not say all the Mahommedan population of the country, but certainly with all the Mahommedan residents in the vicinity, and we think that this is a case which falls within the provisions of section 30 of the Civil Procedure Code. That section enacts that ' where there are numerous parties having the same interest in one suit, one or more of such parties may, with the permission of the Court, sue or be sued or may defend in such suit on behalf of all parties so interested.' It may be quite possible that if these plaintiffs had applied to the Court under the provisions of section 30, they would have obtained permission to institute this suit, but not having obtained that permission, they certainly were not entitled to institute the suit ; and under the circumstances we think that the ground of objection taken by the defendants in the second paragraph of their written statement, and

(1) This will become clear later.

which forms the subject of the second issue, was a good objection, and that this suit was properly dismissed by the District Judge.' Now, with all due deference to the learned Judges who delivered that judgment, I dissent from the remarks which I have just read. I hold that it is an undoubted principle of Mahommedan Law that the persons who have the most direct interest in a mosque are the worshippers who are entitled and accustomed to use it. It is impossible to imagine whose interest in the mosque can be direct if theirs is not, and I should say that, even if this case fell under the purview of section 539, they would have *locus standi* to maintain the suit. But for the reasons which I have already given I am of opinion that neither section 30 nor section 539 of the Civil Procedure Code applies to the present case, and that the plaintiff was competent to maintain the suit.''

The judgment of the Allahabad High Court in conformity with the Mahommedan Law.

The judgment of the Allahabad High Court is in conformity with the provisions of the Mahommedan Law. Every Mussulman who derives any benefit from a *wakf* or trust is entitled to maintain an action against the *mutwalli*, to establish his right thereto, or against a trespasser to recover any portion of the *wakf* property which has been misappropriated, without joining any other person who may participate with him in the benefit.

This is clear from the rules enunciated in the *Durr-ul-Mukhtâr* and the *Radd-ul-Muhtâr*. "Some of the beneficiaries," says the *Durr-ul-Mukhtâr*, "can sue on behalf of the others, as some of the heirs can represent the rest; and according to the *Ashbâh* there is no third case [in which this may be done]." "But," proceeds the author of the *Durr-ul-Mukhtâr*, "I say that similarly the insolvency of a debtor may be established in the presence of one creditor [in other words, one creditor may represent the rest]. Jurists have said that the evidence of insolvency may be taken in the absence of the plaintiff (المدعى). The same rule applies to the objections [to the marriage of a minor] on the part of guardians standing in a position of equality (الاولیا المتاسوین) So also with regard to a guarantee of safety (الامان) granted by one Moslem and the right of retaliation and in seeking the removal of public injuries (ضرر العام) from the path of Moslems in general....Be it noted that one heir can represent all the heirs in the demand for a debt but not for the corpus so long as the property is not in his hands.....Some of the beneficiaries

can sue on behalf of all when the *wakf* is in favour of a body (اذا كان وقف بين جماعة) and the *wâkif* of it is one; in that case one person or his deputy (*wakîl*) can sue on behalf of all, provided the existence of the *wakf* is established but not otherwise."(1)

On this the comment of the *Radd-ul-Muhtâr* is as follows:— "Similarly, that is similar to the right of some of the beneficiaries, مستحقين, to represent all) some of the *nazzâr* (*mutwallis*) of the *wakf* may sue as plaintiffs on behalf of all as is stated in the 11th chapter of the *Tâtâr-Khânieh*.(2)

"A person makes a *wakf* in favour of his kindred and another person claims to be one of them, if the *wâkif* is alive at the time he will become the claimant's opponent (خصمه)(3) otherwise the *Mutwalli*. Even though there may be several *Mutwallis* a suit against one is permissible; it is not a condition that they should all be joined (لا يشترط اجتماعهم). Neither the heir of a deceased person nor one beneficiary can be made a defendant."

"And one heir may represent all the others regarding the realisation of the assets of the deceased.....and the insolvency of a debtor established in the presence of one creditor will bind the others... Similarly the consent of one guardian of the same degree will bind the other guardians."

"In the same way the grant of an *âmän* (guarantee of safety) by one Moslem to a *harbi* (alien)(4) will bind all Moslems, as is stated in the *Siyar* [*kabîr*]."

"So the grant of a pardon [or the waiver of the right of retaliation by one *walî* of the murdered person] will destroy the right as if all the *walîs* had granted the pardon. Whether a pardon granted by adult *walîs* will bind minor *walîs* there is a difference. The rule is that as the right of pardon cannot be divided pardon by one is tantamount to pardon by all unless the adult is a stranger (الا اذا كان الكبير اجنبيا) to the minor. For example if the person killed left a minor son and a widow who is not the mother of the son."

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(1) اذا كان اصل الوقف ثابتا و الا فلا, *Durr-ul-Mukhtâr*, p. 420.

(2) A well-known work on law compiled in the 13th century in India in the reign of Feroze Shah, called after its author, Tâtâr Khan.

(3) That is, he should be made the defendant to the actions.

(4) See *ante*, p. 276

"So also one person may sue on behalf of others [*lit.* other Moslems] to remove general injuries from the path of the public [*lit.* Mussulmans] (in other words, sue to abate nuisances). For example, a person makes a new cess-pool or drain, any member of the public affected thereby may represent the others in an action for its abatement."(1)

The mere fact that the defendant to an action by a beneficiary or a *mutwalli* disputes either the *factum* or the validity of the *wakf* will not alter or affect the right of the plaintiff to maintain the action without joining the other beneficiaries or *mutwallis* as the case may be. It is only where the action is brought for the establishment of the *wakf* that the Mussulman Law apparently contemplates a different course, *viz.*, the necessity of representation on the part of the other persons alleged to be interested in the *wakf* and that condition is complied with when the suit is brought with the leave of the Kâzi.(2)

Unless, therefore, an endowment has been dealt with under Reg. XIX of 1810 and Act XX of 1863, and has come into the possession of trustees under this later Act, no leave is necessary as a condition precedent to the maintenance of an action by a person entitled to the benefit of a *wakf*.

Section 92 of Act V of 1908 (the Code of Civil Procedure) which has taken the place of s. 539, Act XIV of 1882, provides as follows :—

"In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit, whether contentious or not, in the principal Civil Court of Original Jurisdiction or in any other Court empowered in that behalf by the Local Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree—

(*a*) removing any trustee ;

(*b*) appointing a new trustee ;

(1) *Radd-ul-Muhtâr*, Vol. III, pp. 627-8. (2) See *post*, p. 562.

(*c*) vesting any property in trustees;

(*d*) directing accounts and inquiries;

(*e*) declaring what proportion of the trust-property or of the interest therein shall be allocated to any particular objects of the trust;

(*f*) authorizing the whole or any part of the trust-property to be let, sold, mortgaged or exchanged;

(*g*) settling a scheme; or

(*h*) granting such further or other relief as the nature of the case may require.

(2) Save as provided by the Religious Endowments Act, 1863, no suit claiming any of the relief specified in sub-section (*1*) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section."

It will thus be seen that to make the provisions of section 92 applicable to a *wakf*, it must appear that the trust is for a *public* charitable or religious purpose—in other words, that it is vested in the public, or that the beneficiaries are selected from the general body of the public.

"The section presupposes the existence of a public trust and a suit for the administration, either partially or completely, of that trust. It enables the persons mentioned therein to sue trustees to enforce the better administration of the trust. Where, however, it is said that the section presupposes a trust this does not mean that the defendant must admit the trust before the section can apply, but that the suit must proceed upon the allegation of the existence of a trust which may or may not be admitted by the defendant."

"Private trusts concern only individuals or families for private convenience or support. By public trusts may be understood such as are constituted for the benefit either of the public at large, or of some considerable portion of it answering a particular description. In private trusts the beneficial interest is vested absolutely in one or more individuals, who are, or within a certain time may be, definitely ascertained, and to whom therefore collectively, unless under some legal disability, it is, or within the allowed time will be, competent to control, modify or determine the trust. A public or charitable trust on the other hand, has for its objects the members of an uncertain and fluctuating body, and the trust itself is of a permanent character. The trust may be charitable, such as for the relief of the poor, or the advancement of learning, religion or objects of general public utility, or religious, though all religious uses are charitable uses."(1)

What are public trusts under the Mahommedan Law.

A Mussulman mosque (unless it is a *masjid-i-jâm'aa*), a private Imâmbara, *wakfs* created for the disbursement of private charity (such as appeared to be in the case of *Lutfunnissa Bibi* v. *Nazi-*

(1) Woodroffe and Ameer Ali's Civil Procedure Code, pp. 356-7.

run Bibi,(1) or for the benefit of a more or less restricted body of people, is not regarded by the Mahommedan lawyers to be vested in the public. The Mussulman Law makes a broad distinction between *wakfs* which are public in their nature and those which are private. The *wakfs* in which the public have an interest and which may, perhaps, come within the scope of section 92 are the *mâsalih-i-'aâmma*, *e.g.*, public or *jâm'aa-masjids*, bridges over which the entire body of the public have a right of way, caravanserais, where anybody and everybody can alight; public hospitals, public cemeteries; public libraries; public Madrassahs and public Imâmbaras, like the Imâmbara of Hâji Mohammed Mohsin at Hooghly.

With reference to such *wakfs* as are private or only *quasi*-public the provisions of section 92 are in no way applicable. And if they were not taken charge of under Reg. XIX of 1810, and were not transferred to trustees under Act XX of 1863, the provisions of this latter Act would not apply.

In respect of such *wakfs*, therefore, it is submitted the right to bring a suit would be regulated by the general provisions of the Mahommedan Law.

Who may sue to recover trust-property.

It has already been remarked that where the nature of the *wakf* is undisputed, or where the fact of the property being trust-property is admitted, and there are several trustees, one or more of them can bring a suit in respect of the trust-estate without joining the others. If there is no trustee or none willing to act, any one of the beneficiaries or some of them can sue on behalf of the others without leave of the Kâzi. If there is any dispute regarding the *wakf*, some of the trustees, and in their absence, some of the beneficiaries can sue on behalf of the others with the permission of the Kâzi. A right to sue for recovery of property alleged to be *wakf* belongs not to the heirs or descendants of the settlor but to the *mutwallis* jointly.(2) But a person who has been convicted of having misappropriated *wakf* property cannot obtain the assistance of the Court to recover the property to enable him to exercise the functions of a *mutwalli*.(3)

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(1) Supra.

(2) [1879] *Phate Saheb Bibi* v. *Damodar Premji*, I. L., 3 Bom., 84.

(3) *Aga Mahommed Kumul Tehranee* v. *Aga Abbas Tehranee*, S. D. A., 1859, p. 285.

The beneficiaries of a *wakf* or some of them are entitled to maintain a suit to restrain the *mutwalli* from wasting the trust-estate or misapplying it.(1)

Regarding the procedure to be observed when there are several *mutwallis* and some of them are unwilling to join the others in bringing a suit to recover the alleged trust-property, the ruling in the case of *Bechu Lall* v. *Oliullah*(2) is in point. In that case it was held that where there are several *mutwallis*, all of them, if possible, should be made plaintiffs ; but if any of them refused, then they should be made defendants. *Bechu Lall* v. *Oliullah.*

It would seem, however, from the following principles that the ruling in this case falls short of the Mahommedan Law :—

"If the *wâkif* do not appoint a *mutwalli* until death comes on him and then give directions to some person (as to how he is to act after his death), such person will become the *wasî* of his estate and effects, and will be the *mutwalli* of his *wakf*. Hillâl has stated that the executor of a person who has made a *wakf* will be associated with the *mutwalli* in the work of the trust [in the same way] as if he also was appointed a *mutwalli* therefor, as is stated in the *Muhît*. And if a person makes one person the *mutwalli* of his *wakf* and then appoints an executor, the latter will become a partner of the *mutwalli* in the governance of the *wakf*."(3)

"If there are two *mutwallis* of a *wakf* appointed by the Kâzis of two different cities, according to the Shaikh Imâm Zâhidi, each of them will be entitled to administer the properties within the jurisdiction of the Kâzi appointing him."

"If the *wâkif* entrusts the governance of the *wakf* to two persons, or to a *mutwalli* and a *wasî*, neither of them would be entitled singly to sell the proceeds of the *wakf*, though, according to Abû Hanîfa, each might act with the sanction of the other when the person acting would be regarded as the mandatory of the other; so it is stated in the *Hâwi*."(4)

"If two *wâkifs* join in making one dedication and jointly appoint two *mutwallis*, both these *mutwallis* would be like one. If

(1) *Abdur Rahman* v. *Yar Mahommed* [1881], I. L., 3 All., 636.
(2) [1885] I. L., 11 Cal., 338.
(3) Fatâwai Alamgiri, Vol. II, pp. 505, 509.
(4) *Ibid*, Vol. II, p. 506.

they are separately appointed by two different Kâzis of two different places, they may each act as far as the property within their respective jurisdictions is concerned according to Imâm Zâhidi."(1)

"Some of the beneficiaries can sue on behalf of the others. So also some of the *mutwallis* can stand(2) as litigants on behalf of the entire body; this is like the position of a *wasî-bi'n-nikâh* (a guardian for marriage); all these guardians, if more than one and belonging to the same class, stand on the same footing, and, therefore, if one of them is authorised by the others to consent on behalf f all, no outsider can raise any objection."

"Where there is a *mutwalli*, a *cestui que trust* cannot lay a claim without leave of the Kâzi for the recovery of any property which has been wasted or usurped [by an outsider], for that right pertains to the *mutwalli*, but a beneficiary can sue the *mutwalli* if *he* is a *ghâsib* (misappropriator), and may establish his title to a share in the profits of the *wakf*."

Some of the persons interested may sue on behalf of the entire body, when the property is admittedly *wakf*, without leave of the Kâzi.

Right of suit when property is admittedly *wakf*.

"In the *Bâzâzia* it is stated from the *Durrar wa'l Ghurrar* that when a property is dedicated for the poor or for any purpose among the purposes acceptable to the Almighty God, and it has been wrongly taken hold of by an usurper, the *mutwalli* has ordinarily the right to sue for its recovery. And if the *ghâsib* has made any erections or planted any trees, and they can be removed without any damage to the *wakf* premises, he will be allowed to do so, not otherwise. In the latter case, if his possession commenced *bonâ fide*, he would only get ordinary compensation.(3)

When the *mutwalli* is himself the *ghâsib*, or has, in breach of his trust, conveyed the property to another, the beneficiaries are entitled to sue the *mutwalli* or to sue him jointly with his assignee to recover the property.

Right of suit where the character of the *wakf* is in dispute.

But even where the character of the *wakf* is in dispute, a person who alleges to be beneficially interested jointly with others in the

(1) *Fatâwai Kâzi Khân*, Vol. IV, pp. 304-306.

(2) The word used here is (ينصب) which is intransitive and means, can stand or can be constituted.

(3) *Surrat-ul-Fatâwa*, p. 437.

wakf, is entitled to sue for its recovery, if it is misappropriated, with the leave of the Kâzi, without any difference of opinion. If he sues without such leave, and the *wakf* is in favour of a limited number of individuals, there are two opinions regarding the question. But the more correct view is that he cannot sue for the possession of the property, because he is only entitled to an interest with other specific individuals in its income. For example, if the *wakf* is for the sons of *A*, or for Zaid, Bakr, 'Amr and Hafsa, one of them cannot sue singly to recover an usurped property without leave of the Kâzi. The reason on which this rule seems to be founded is obvious. The other beneficiaries not caring to have the property or to launch into a speculative suit, the Kâzi will have to see whether there are *primâ facie* grounds for the institution of the suit. But a person who is the sole beneficiary may sue without such leave. Where, however, the *wakf* is in favour of, or alleged to be in favour of, a body of people, varying in number, *some of them may sue without leave of the Kâzi*, for the right to the benefit of the *wakf* is not vested specifically in each beneficiary, but they are all collectively and separately entitled to its benefit as a whole. For example in the case of a mosque any person who is in the habit of praying there is entitled to its full use; his right to its user is wholly independent of the right of other Moslems; nor is there any limit to the number of people who may offer their prayers therein. *Consequently, any one of the devotees may sue without leave of the Kâzi.*

These distinctions were overlooked in the Calcutta cases.

When there are several people entitled to the benefit of a *wakf* some of them may sue the others for embezzlement.

"The position of a *mutwalli* and an executor is alike. The dealing of one of two *wasîs*, like the acts of one of two *mutwallis*, is void, for the two *mutwallis* and the two executors are alike in certain matters. This is the saying of the *Ashbâh* and *Kinia*. The result is, that if one of two executors, or if one of two *mutwallis* were to give a lease of the *wakf* land, it would not be valid without the assent of the other, though both may have been appointed separately. Some jurists have no doubt held that they can act separately. And Abû Lais has held that this is the approved doctrine, and we ought to adopt it. But the first doctrine is mentioned in the *Mabsût* as the correct one, and it has been accepted

in the *Durrar*, and Kahastâni has stated that it is the right view.'' The author of the *Radd-ul-Muhtâr* then proceeds to say, "my view is, that this is so when the two *mutwallis* or the two executors have been appointed by the same *wâkif* or testator or by one Kâzi. Accordingly, the act of one will be valid when ratified by the other, and no renewal of the obligation will be necessary as is mentioned in the *Manah*. So is the position of an executor associated with a *mutwalli*. And it is mentioned in the *Hâmidia* from the *Ism'ailia*, that if a *wasî*, without the knowledge of the *mutwalli*, deals with the estate and some of it is lost, he would be liable for damages.''(1)

Acts of one executor or one *mutwalli* how far valid.

"But the acts of one of two executors or of one of two *mutwallis* are valid in respect of the buying of shrouds for the testator or *wâkif* and his funeral, and in demanding and litigating for the debts due to his estate and for his *rights*. The doctrine of the lawfulness of one *mutwalli* or of one executor demanding by himself the dues to the estate of the deceased or bringing a suit therefor is founded upon reasons of necessity. [For example, the other executor may refuse to act, and owing to his conduct the *wakf* property may be about to be wasted or the other *mutwalli* may be absent.] So it is mentioned in the *Nikâya*, and its commentator Kahastâni implies the same. The right to litigate is supported by the *Zakhîra*. But Abû Yusuf has held that either *mutwalli* can act by himself, unless the *wâkif* has expressly provided that they must act together.(2) If one *mutwalli* refuses to act he must be taken to have renounced the trust. And the other *mutwalli* can act for the protection of the estate until the Kâzi has appointed another or authorised him to act as the sole *mutwalli*.''(3)

"The permission for one *mutwalli* alone to bring a suit without joining the others is founded on the reason that they cannot act jointly in preferring their claim, and even should they join, only one can be allowed to plead. This is in the *Durrar*.''(4)

"When a person has appointed two executors, and one of them dies appointing the other as his executor, the surviving

(1) *Radd-ul-Muhtâr*, Vol. III, p. 689.
(2) *Ibid*, Vol. III, p. 690.
(3) *Fatâwai Kâzi Khân*, Chapter on Wills, p. 434.
(4) *Radd-ul-Muhtâr*, Vol. III, p. 690.

executor can act for the original testator as the sole executor.''(1)

'' If one man appoints two executors, according to Abû Hanîfa and Mohammed, neither of them can act singly in dealing with the properties of the testator, and the acts and dealings of one of them are not valid without the permission of the other, except in certain matters, *viz.*, the funeral of the deceased, the payment of his debts and legacies, the emancipation of his slaves, the restoration of deposits and usurped properties. But they cannot act singly in taking possession of properties and debts restored to, or paid to his estate, *though any one of them may sue singly to recover his rights due from other people.*''(2)

'' Any one of the trustees may act singly in the following matters, *viz.*, the buying of shrouds, burying the testator, supplying the food and raiment of his infant children, returning the deposits with the testator, paying off his debts and legacies, emancipating his slaves, and *litigating for his rights.*'' If there are co-trustees of lands, any one of them may receive the rents, though all must join in a conveyance.(3)

Where a person creates a *wakf* and appoints two *mutwallis* with powers to nominate their successors '' acting conjointly and in unanimity with each other,'' and one of the *matwallis* happens to die, if the *wâkif* is not alive, the proper course for the surviving *mutwalli*, according to all the authorities, would be to apply to the Kâzi (in other words the principal court of civil jurisdiction) to associate another trustee with him for the purpose of nominating a successor to the original *mutwalli*.

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(1) *Fatâwai Kâzi Khân*, Vol. IV, p. 441.
(2) *Ibid*, p. 440.
(3) *Fatâwa'e Sirajia ; Cf.* Jarman on Wills, II, p. 432.